86-375

No.

Supreme Court, U.S.
FILED
SEP 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE WHITE MOUNTAIN APACHE TRIBE, a body corporate established pursuant to 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476) and duly recognized by the Secretary of the Interior,

Petitioner,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, DONALD P. HODEL, *et al.*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM H. VEEDER
Suite 920
818 18th Street, N.W.
Washington, D.C. 20006
(202) 466-3890

Attorney for
White Mountain Apache Tribe
Petitioner

QUESTIONS PRESENTED

WHETHER the Court of Appeals erred in interpreting the McCarran Amendment, 43 U.S.C. 666—which is a most constricted waiver of sovereign immunity involving the adjudication of rights to the use of water of a river system or other source—as divesting the United States District Court of jurisdiction over this action initiated by Petitioner Tribe and declaring that jurisdiction resides in the Arizona State Court General Adjudication Water Rights Proceedings to hear and to adjudge Petitioner Tribe's charges that Respondent Donald P. Hodel and subordinates of that official, as individuals, are fraudulently, intentionally, and illegally violating Petitioner Tribe's reserved Salt River rights for the benefit of the Secretarial Salt River Federal Reclamation Project?

WHETHER the Court of Appeals erred in affirming the District Court's Rule 54(b) Order severing that phase of Petitioner Tribe's claims respecting the intentional, fraudulent, and illegal violation of Petitioner Tribe's reserved Salt River rights and summarily dismissing that phase of Petitioner Tribe's claim against Respondent Secretary Hodel and subordinates on the grounds that the Arizona State Court, not the United States District Court, had jurisdiction of Petitioner Tribe's controversy with Respondent Hodel and subordinates respecting its reserved Salt River rights?

WHETHER the Court of Appeals erred in totally recasting Petitioner Tribe's complaint by declaring that Petitioner Tribe was proceeding against the United States, irrespective of the explicit pleadings in the complaint that Petitioner Tribe's action was against Respondent Hodel and subordinates *as individuals* acting illegally, intentionally, fraudulently, and beyond the scope of their authority—not as officials of the United States —in violating Petitioner Tribe's reserved Salt River rights?

WHETHER this action should be remanded to the District Court for final resolution while the State Court W-1 Proceedings are in their infancy rather than adopting the course required by the United States Court of Appeals which would enmesh the highly controversial charges of fraud and illegality

directed against Respondents, in the State Court W-1 Proceedings which, it is conservatively estimated, will consume a minimum of a half century to complete during which time the festering issue presented here may well remain unresolved and a constant threat to the full resolution of the controversies among the tens of thousands of water rights claimants in the State Court W-1 consolidated cases?

* * * *

A list of all parties to the proceedings in the court whose judgment is sought to be reviewed [substituted parties]:

> Donald P. Hodel, Secretary; James H. Stevens, Area Director, Bureau of Indian Affairs; Henry Dodge, Area Land Operations Officer; Russell Bradley, Superintendent of the Bureau of Indian Affairs, Fort Apache Indian Reservation; Morris Williams, Forester; Kenneth Butler, Forester; Michael Smith, Agency Land Operations Officer, and the incumbent personnel of the Bureau of Indian Affairs.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 8, Clause 3.

> The Congress shall have power . . . to regulate Commerce . . . with the Indian Tribes; . . .

Constitution of the United States, Article VI.

> This Constitution, and Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding.

Constitution of the United States, Amendment [V.], Rights of Persons.

> No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1362. Indian Tribes.

> The district courts shall have original jurisdiction of all civil actions brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States. (Emphasis supplied).

Declaratory Judgments Act

28 U.S.C. 2201. Creation of remedy.

> In a case of actual controversy within its jurisdiction, except with respect to Federal Taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

43 U.S.C. 666

> Suits for adjudication of water rights—Joinder of United States as defendant; costs
>
> (a) Consent is given to join the United States as a defendant any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation

under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

Service of Summons

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

Joinder in suits involving use of interstate streams by State.

(c) Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream. July 10, 1952, c. 651, Title II, 208 (a)-(c), 66 Stat. 560.

5 U.S.C. 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statue, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee hereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The

United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States; Provided, That any mandatory or injunctive decree shall specify the Federal offier or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statue that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CONSTITUTION AND STATUTORY PROVISIONS INVOLVED	
Constitution of the United States, Article I, Sec. 8, Clause 3	ii
Constitution of the United States, Article VI	ii
Constitution of the United States, Amendments [V.]	iii
28 U.S.C. 1362—Indian Tribes	iii
28 U.S.C. 2201—Creation of remedy	iii
43 U.S.C. 666—McCarran Amendment	iii
5 U.S.C. 702—Right of review	iv
5 U.S.C. 706—Scope of review	v
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
Parties	2
Jurisdiction	2
Petitioner Tribe Charges Respondent Secretary Hodel and Subordinates with Fraudulent Mismangement of its Reservation	3
A. Fraud is Wallmark of Secretarial Management Tribe's Reservation	5
B. A Critical Element of Secretarial Fraud—Destruction of Petitioner Tribe's Forest and Grazing Land To Enhance Salt River Flow	5
C. Artificially Enhanced Salt River Runoff a Consequence of Secretarial Fraud	7
D. Petitioner Tribe Entitled to Injunctive Relief Against Fraudulent Conduct of Respondent Secretary—Damages Totally Inadequate	8

Page

Allegation in Petitioner Tribe's Complaint To Be Taken as True 8

Petitioner Tribe's Action Is To Restrain Fraudulent and Illegal Conduct by Respondent Hodel and Subordinates 9

Petitioner Tribe's Reserved Salt River Rights Are Interests in Real Property of the Highest Dignity. 10

Respondent Hodel and Subordinates Without Power or Authority To Seize Petitioner Tribe's Reserved Rights 10

Consummation of Secretarial Fraud in State Court W-1 Proceedings 12

State Court W-1 Proceedings 12

Petitioner Tribe's Unvarying Resistance to the Water Rights Claim Filed in the State Court W-1 Proceedings 12

ARGUMENT 14

REASON FOR GRANTING PETITION FOR WRIT OF CERTIORARI 14

COURT OF APPEALS' ERRONEOUS OPINION DEPARTS FROM ACCEPTED COURSE OF JUDICIAL PROCEEDINGS AND ADVERSELY IMPACTS FEDERAL-STATE-TRIBAL JURISDICTION 14

The Companion Case 14

Appellate Court Departs Sharply from the Court's Opinions 14

The Court of Appeals Departs Radically from Its Own Decisions 18

Language of and the Interpretations Placed upon the McCarran Amendment, 43 U.S.C. 666 19

CONCLUSION 24

TABLE OF AUTHORITIES

CASE	Page
Arizona v. California, 376 U.S. 340 (1964)	3, 4
Arizona v. San Carlos, 463 U.S. 545, 569 (1983)	9a, 10a, 11a
Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 330 (1936)	10
Colorado Conservation District v. United States, 424 U.S. 800, 808 (1976)	20
Curtis v. Everette, 489 F.2d 516, 518 (CA 3, 1976) *cert.den.* 1973	9
Dugan v. Rank, 372 U.S. 609, 618 (1963)	16, 20, 5c
Garrett v. Bamford, 538 F.2d 63, 65 (CA 3, 1976); *cert.den.* 429 U.S. 977 (1976)	9
Fuller v. Swan River Placer Mining Co., 12 Colo. 12, 17; 19 Pac. 836 (1898)	10
Ickes v. Fox, 300 U.S. 82, 96 (1937)	
Johnsrud v. Carter, 620 F.2d 29, 32 (CA 3, 1980)	9
Land v. Dollar, 330 U.S. 731, 738 (1947)	16
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 691 (1949)	
Lindsey v. McClure, 136 F.2d 65, 70 (CA 10, 1946)	10
Philadelphia v. Stimson, 223 U.S. 605 (1912)	10
Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)	22
Scheuer v. Rhodes, 416 U.S. 232 (1974)	8
Seminole Nation v. United States, 316 U.S. 266, 297 (1942)	
Shoshone Tribe v. United States, 299 U.S. 476, 497, 498 (1937)	4, 11, 12
Smith v. Curtis, 416 U.S. 995	9
Sowards v. Meagher, 37 Utah 212; 108 Pac. 1112 (1910)	10
Turner v. Kings River Conservation District, 360 F.2d 184, 189 (1916)	
United States v. Chandler Dunbar Co., 229 U.S. 53, 73, (1913)	10
United States v. Creek Nation, 295 U.S. 103 (1935)	
United States v. Lee, 106 U.S. 196 (1882)	
United States v. Sherwood, 312 U.S. 584 (1940)	

	Page
United States v. White Mountain Apache Tribe, 784 F.2d 719 (CA 9, 1986)	22
Washington v. Udall, 417 F.2d 1310, 1318, 1320 (CA 9, 1959)	18
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 138 (1980)	15
White Mountain Apache Tribe v. Secretary Clark [*Hodel*], 604 F.Supp. 185 (U.S.D.C.D. Ariz.)	1, 8, 5c
White Mountain Apache Tribe v. Secretary Clark [*Hodel*], 784 F.2d 921 (CA 9, 1986)	1, 14, 19
White Mountain Apache Tribe v. Shelley, 107 Ariz. 4; 480 Pac.2d 654 (1971)	21
Winters v. United States, 207 U.S. 564 (1908)	3, 4
Wright v. Best, 19 Cal.2d 368; 121 Pac.2d 702 (1942)	10
STATUTES	
25 U.S.C. 476	
15 U.S.C. 1362	iii
28 U.S.C. 1254(1)	
43 U.S.C. 666 (McCarran Amendment)	iii
28 U.S.C. 2201	iii
30 Stat. 62, 64	4
82 Stat. 885	6
MISCELLANEOUS	
Rule 17, Supreme Court Rules, "Jurisdiction on Writ or Certiorari"	14
Bogert, *The Law of Trusts And Trustees,* Rev. 2d ed. 1978, § 543, p. 187, "Trustee's Duty Of Loyalty To Beneficiaries"	11
Vol. 2. Scott, *Law Of Trusts,* "Duties Of the Trustee," § 169, p. 1297	11
Vol. 1, *Restatement Of The Law Of Trusts Second,* § 170, "Duty of Loyalty"	11
1 Story, Equity Jurisprudence, Sec. 187	5
Vol. 2A, *Moore's Federal Practice 1983-84,* Commulative Supplement, Sec. 1208, p. 2266	9
5 *Federal Practice and Procedure,* Wright, Miller & Kane, 1350, pp. 551-52	9
Wiel, *Water Rights in the Western States,* 3rd. Ed., Vol. 1, Sec. 18, pp. 20, 21; Sec. 283 pp. 298-300; Sec. 285, p. 301	10

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner White Mountain Apache Tribe respectfully prays the Court that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Ninth Circuit which was rendered on March 7, 1986, and a timely petition for rehearing *en banc* having been denied by the Court of Appeals on June 3, 1986.

OPINIONS BELOW

The United States District Court for the District of Arizona entered its original order dismissing Petitioner Tribe's complaint on October 12, 1984.[1] That order is Appendix A of this Petition. Subsequently, the District Court, at Petitioner Tribe's request, reconsidered its October 12, 1984 order and entered its February 15, 1985, Rule 54(b) Order,[2] Appendix B of this motion. Petitioner White Mountain Apache Tribe appealed the Rule 54(b) order to the United States Court of Appeals for the Ninth Circuit. That Court of Appeals rendered its opinion on March 7, 1986.[3] That opinion is Appendix C of this Petition. On June 3, 1986, the Court of Appeals entered its order denying the petition for rehearing *en banc*. That Order is Appendix D of this Petition.[4]

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was rendered March 7, 1986.[5] The Order denying petition for rehearing *en banc* was entered June 3,

---

[1] Appendix A, *White Mountain Apache Tribe v. Secretary Clark* [Hodel], *et al.*, 604 F.Supp. 185 (U.S.D.C.D. Ariz. 1984).

[2] Appendix B, Order, October 12, 1984.

[3] Appendix C, *White Mountain Apache Tribe v. Secretary Hodel, et al.*, 784 F.2d 921 (CA 9, 1986).

[4] Appendix D, Order dated June 3, 1986.

[5] Appendix C.

1986 [6] and the 90-day period for filing a petition for a Writ of Certiorari will expire September 2, 1986. Petitioner Tribe's motion filed August 27, 1986 for an extension of time in which to file this petition for a Writ of Certiorari was denied August 29, 1986.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

INTRODUCTION

Parties: Petitioner White Mountain Apache Tribe, Fort Apache Indian Reservation, Whiteriver, Arizona, is a duly organized Indian Tribe recognized by the Secretary of the Interior in accordance with 25 U.S.C. Sec. 476.[7] Petitioner Tribe, on October 20, 1983, filed its complaint for Declaratory Judgment and for Permanent Injunction, not monetary damages, against James G. Watt, then Secretary of the United States Department of the Interior; the present incumbent is Secretary Donald P. Hodel. The action was initiated in the United States District Court for the District of Arizona, Civ. 83-2045.

Jurisdiction of District Court: Pursuant to 28 U.S.C. 1362, Congress provides that an Indian Tribe in the status of Petitioner, may initiate civil actions of the nature here involved arising "... under the Constitution, laws, or treaties of the United States." There is a genuine, onoging, irreconcilable conflict between Petitioner White Mountain Apache Tribe and Respondent Donald P. Hodel, Secretary of the Department of the Interior, which conflict comes within the purview of 28 U.S.C. 2201, *et seq.,* the Declaratory Judgment Act. Pursuant to 28 U.S.C. 1362, Petitioner Tribe may implement the declaratory judgment relief which it seeks by an appropriate injunction order for which it has prayed.

---

[6] Appendix D.

[7] *See* Appendix E to this Petition, Complaint, Location Map following p. 1.

By this action, Petitioner Tribe seeks its day in Court to establish the fact that successive Secretaries of the Interior, subordinates of those officials, Respondent Hodel and subordinates of that official, have in the past and are now illegally and fraudulently violating and threatening to continue to violate Petitioner Tribe's Constitutional, civil, and vested property rights, which are protected by the Due Process provisions of the Constitution.

Petitioner Tribe Charges Respondent Secretary Hodel and Subordinates, With Fraudulent Mismanagement of Its Reservation: Petitioner White Mountain Apache Tribe, in its Complaint,[8] reviews the corrupt history of the Department of the Interior in the mismanagement of its Reservation, which was created by Executive Orders dated November 9, 1871 and December 14, 1872.[9] Inherent in those Executive Orders is the controversy giving rise to this Petition. Those Executive Orders establish the Northern Boundary of the then White Mountain Apache Indian Reservation as being . . . the South Edge of the Black Mesa," which constitutes the watershed divide between the Salt River drainage and the drainage of the Little Colorado.[10] Stressed in that Complaint is the fact concerning that the Salt River, which arises within the Fort Apache Indian Reservation is the lifeline of Petitioner Tribe for, as the Court has recognized, water in the arid West is an imperative necessity if the Indians are to survive on their Reservations.[11] It is a controlling fact, respecting Petitioner Tribe's action against Respondent Hodel and subordinates of that official, that the Salt River and numerous tributaries of that stream rise within the Fort Apache Indian Reservation and constitute the sole source of water now and in the future for Petitioner White Mountain Apache Tribe. The Secretary of the Interior re-

---

[8] Appendix E, Complaint, pp. 4, *et seq.*

[9] Appendix E, Executive Orders are Appendix A to Complaint, pp. 1-5.

[10] *See, Supra.*, ftn. 7, Location Map; Appendix E, Complaint, p. 8, para. XVII, Plates I and II, locating the South Edge of the Black Mesa, headwaters of Salt River.

[11] *Arizona v. California,* 373 U.S. 564, 599-601 (1963), citing *Winters v. United States,* 207 U.S. 546 (1908).

quested and there was established in 1897 the [12] the Fort Apache Indian Reservation which, as can be seen from the Location Map set forth in Petitioner Tribe's Complaint, is a hydrological unit encompassing the Upper Drainage of the Salt River.

Gravamen of Petitioner Tribe's Complaint against Respondent Secretary is that the Fort Apache Indian Reservation was severed from the White Mountain Apache Indian Reservation solely for the purpose of providing a water supply from the Salt River for the non-Indian water users in the Salt River Valley. Confirming that contention of Petitioner Tribe is the fact that immediately following the severance of the Upper Drainage of the Salt River encompassed by the Fort Apache Indian Reservation, on March 14, 1903, the Secretary of the Interior, authorized the construction of the Salt River Federal Reclamation Project.[13] Thereafter—*totally without authority*—in clear violation of Petitioner Tribe's reserved rights to the use of water in the Salt River and its tributaries [14] and in clear violation of the obligations of the United States of America Trustee for Petitioner Tribe,[15] the Secretary of the Interior: (1) claimed *all* of the waters of the Salt River for the benefit of the Salt River Federal Reclamation Project to the total exclusion of Petitioner Tribe;[16] (2) planned, designed, constructed; and (3) now operates the Salt River Federal Reclamation Project utilizing all of the surface, flood flow, and all of the water that the Secretary can artificially induce to flow away from the Fort Apache Indian Reservation for the use and benefit of the non-Indian water users in the Salt River Federal Reclamation Project.[17]

---

[12] 30 Stat. 62, Act June 7, 1897. "Be it enacted, * * * That a separate agency is hereby created to cover and have jurisdiction over all that portion of the White Mountain or San Carlos Reservation lying north of the Salt or Black River, to be known as the Fort Apache Reservation, with headquarters at Fort Apache, Arizona: * * *"

[13] Appendix E, Complaint, Location Map following p. 1.

[14] *Supra. ftn. 11, Arizona v. California; Winters v. United States.*

[15] *Shoshone Tribe v. United States,* 299 U.S. 476, 497 (1937); Seminole Nation v

[16] Appendix E, Complaint, p, 23, para. XLVII, *et seq.*

[17] *Ibid.*, at p. 34, para. LXVIII, "Induced Aridity—Secretarial Scorched Earth Policy," *et seq.*

A. Fraud is Hallmark of Secretarial Mismanagement of Petitioner Tribe's Reservation:

Justice Story has defined fraud, in the sense the term is used here, as acts and concealments which involve a breach of trust justly reposed or by taking an undue and unconscionable advantage.[18] From time immemorial Petitioner Tribe has utilized the waters of the Salt River and its tributaries that arise on the Fort Apache Indian Reservation, which Reservation, as stated above, was intentionally severed from the White Mountain Apache Indian Reservation in 1897 by the Secretary of the Interior solely for the purpose of providing a firm supply of water to the non-Indian water users in the Salt River Valley.[19] At no time was Petitioner Tribe informed that the Secretary of the Interior has illegally committed—wholly without authority—[20] *all* of the waters of the Salt River for the benefit of the Salt River Federal Reclamation Project to the exclusion of Petitioner Tribe.

In 1913, Congress investigated the corruption in the Department of the Interior involving the Salt River Federal Reclamation Project and declared, among other things, that: "The Indian interests have been most outrageously intermingled with the affairs of the Reclamation Service. . ." Transations in which the Department of the Interior engaged in connection with the Project have, said Congress: ". . .many of the badges of fraud." [21]

Throughout the scandalous history of the Salt River Federal Reclamation Project, successive Secretaries of the Interior, including the incumbent Respondent Secretary Hodel, have operated that project in clear violation of Indian reserved rights including those of Petitioner Tribe. Incumbent Respondent Secretary Hodel has announced the enlargement of Roosevelt Dam, the principal component of the Salt River Federal

---

[18] 1 Story, *Equity Jurisprudence*, Sec. 187.

[19] Appendix E, Complaint, p. 22, para. XLVI, "Secretarial Mismanagement of . . . Fort Apache Indian Reservation for the Benefit of Reclamation Projects . . ."

[20] Appendix E, p. 30, para. LX, *et seq.*

[21] Appendix E, Complaint, p. 23, para. XLVIII.

Reclamation Project better to manage the waters of the Salt River for the benefit of the non-Indian Project in total disregard of the Petitioner Tribe's reserved rights in that river.[22]

In furtherance of the Salt River Federal Reclamation Project, the successive Secretaries of the Interior, including incumbent Respondent Hodel, have—to the irreparable damage of Petitioner Tribe—systematically suppressed irrigation and other water use development upon Petitioner Tribe's Reservation to the end that all the waters within the Reservation flow away from the Reservation for the benefit of the Salt River Project. The bureau of Indian Affairs, an agency administered by the Secretary of the Interior, manages Petitioner Tribe's Reservation on the basis that "every drop of" Salt River water on the Reservation is committed to the Salt River Federal Reclamation Project.[23]

B. *A Critical Element of Secretarial Fraud—Destruction of Petitioner Tribe's Forests and Grazing Land To Enhance Salt River Flow:* A critical element in Petitioner Tribe's Complaint has been the "Fraudulent Facade" behind which successive Secretaries of the Interior, including the incumbent, have consistently manipulated Petitioner Tribe's Reservation and in so doing have engaged in "... fraud, sham, bad faith and ... scandalous conduct." [24]

Ongoing destruction by Respondent Hodel of Petitioner Tribe's forests to enhance Salt River flow away from Petitioner Tribe's Reservation exemplifies the invidious character of the fraud being practiced upon Petitioner Tribe. Large areas of Petitioner Tribe's invaluable forests have been clearcut with the objective of obtaining greater runoff away from the Reservation.[25] In addition to the destruction of Petitioner Tribe's forests, there has been an intentional mismanagement by the Secretary of the Interior of Petitioner Tribe's grazing lands. As a consequence of the enhanced runoff and the destruction of

---

[22] 82 Stat. 885, United States Department of the Interior Budget Justification F.Y. 1987.

[23] Appendix E, Complaint, p. 30, para. LX.

[24] *Ibid.*, at p. 46, para. XCVI.

[25] *Ibid.*, at p. 37, para. LXXVIII, "Mismanagement of Forests To Increase Runoff."

Plaintiff Tribe's once-fine grazing lands by the Secretary of the Interior, soil erosion is rampant throughout the Reservation giving rise to accelerated runoff which produces sheet and gully erosion and has destroyed thousands of irrigable acres of land on the Reservation.[26]

C. *Artificially Enhanced Salt River Runoff a Consequence of Secretarial Fraud:* Irreparable and continuing damage through Secretarial intentional mismanagement of Petitioner Tribe's Reservation has far reaching and destructive implication for Petitioner Tribe. Not only did the Secretary of the Interior claim and utilize *all* of the waters arising upon the Fort Apache Indian Reservation for the benefit of the Salt River Federal Reclamation Project, successive Secretaries of the Interior including Respondent Hodel, have at great cost, manipulated forest growth and vegetative cover with the objective of artificially enhancing Salt River stream flow away from the Reservation. Short-term results of that destruction of trees and native grass was an artificially enhanced flow of Salt River water away from the Reservation and down to the Secretarial Slat River Federal Reclamation Project of Upwards to 100,000 additional acre feet of water annually.[27] Long term consequences of that destruction of Petitioner Tribe's forest and vegative cover gave rise to an intrusion of noxious weeds and a proliferation of pinyon juniper throughout the entire Reservation destroying thousands of acres of once fine grazing lands. As a consequence of the growth of pinyon juniper and noxious plant life, there was a depletion of the natural flow away from the Reservation. The pinyon juniper infestation not only deprived Petitioner Tribe of invaluable grazing lands, the pinyon juniper consumed huge quantities of water to which Petitioner Tribe is entitled. Contemporaneously with the proliferation of juniper growth throughout the Reservation, Agents of the Secretary of the Interior, to enhance stream flow for the Salt River Project, destroyed, by poison and otherwise, the trees and other growth along the banks of the streams, resulting in a severe downgrading of the beds of the stream and

---

[26] *Ibid.*, at p. 19, para. XXXVIII, "Catastrophic Erosion Throughout the Reservation."

[27] *Ibid.* Appendix E, Complaint, p. 45, para. XCIV.

erosion of large areas of bottom land, much of which involved destruction of Plaintiff Tribe's irrigated land.

D. *Petitioner Tribe Entitled to Injunctive Relief Against Fraudulent Conduct of Respondent Secretary—Damages Totally Inadequate:* Petitioner Tribe seeks injunctive relief to prohibit further destruction of its Fort Apache Indian Reservation by Respondent Secretary of the Interior and his subordinates for the benefit of the Salt River Federal Reclamation Project and now the Central Arizona Federal Reclamation Project. As subsequently reviewed, the District Court and the Court of Appeals were in grave error when they purport to relegate Petitioner Tribe to money damages.

ALLEGATION IN PETITIONER TRIBE'S COMPLAINT TO BE TAKEN AS TRUE

By summarily dismissing Petitioner Tribe's complaint, the District Court committed plain, serious, and reversible error.[28] It is elemental that, when considering a motion to dismiss, the allegations of illegal and fraudulent conduct by successive Secretaries of the Interior and their subordinates are to be taken true.[29] There the Court declared that where, as here, a complaint is summarily dismissed by the District Court, the facts alleged in the complaint must be taken as true. *Scheuer v. Rhodes* is, moreover, precedent for the proposition that a complaint must be construed favorably to the pleader and that upon a motion to dismiss the task of the District Court is "necessarily a limited one."

> The issue [for the court to decide on a motion to dismiss] is not whether plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

Continuing the Court, quoting from *Conley v. Gibson,* declared:

> 'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint

---

[28] Appendix A, *White Mountain Apache Tribe v. Hodel,* 604 S.Supp. 185, 186, 190, (U.S.D.C.D. Ariz. 1984).

[29] *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1978).

> should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' [30]

On repeated occasions, those concepts have been applied, it having been stated as a governing precept of the law that "... the well-pleaded allegations of the complaint are taken as admitted..." [31] Moreover, "summary disposition" is disfavored.[32]

PETITIONER TRIBE'S ACTION IS TO RESTRAIN FRAUDULENT AND ILLEGAL CONDUCT BY RESPONDENT HODEL AND SUBORDINATES

There has been pleaded above the grave misconduct and successive Secretaries of the Interior, their subordinates, Respondent Hodel and his subordinates who have intentionally mismanaged Petitioner Tribe's Fort Apache Indian Reservation; have destroyed Petitioner Tribe's grazing lands; have destroyed large areas of Petitioner Tribe's forest lands; and have claimed *all* of the waters of the Salt River and its tributaries for the benefit of the Secretarial Salt River Federal Reclamation Project. Those charges are made against Respondent Hodel and subordinates, not against the United States of America. The charges are against the named officials as individuals who are destroying Plaintiff Tribe's Reservation by arbitrary, capricious, and fraudulent acts beyond the scope of their authority.

---

[30] *Ibid.*, at p. 238.

[31] Vol. 2A, *Moore's Federal Practice,* 1983-84 Cumulative Supplement, Sec. 1208, p. 2266 and cited authorities. In addition, *see* also *Garrett v. Bamford,* 538 F.2d 63, 65 (CA 3,1976), *cert. den.,* 429 U.S. 977 (1976), citing *Walker, Inc. v. Food Machinery,* 381 U.S. 1972, 174-75, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965); *Curtis v. Everette,* 489 F.2d 516, 518 (3d Cir. 1973), cert. den. sub. nom.; *Smith v. Curtis,* 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974), 5 *Federal Practice and Procedure,* Wright, Miller & Kane, 1350, pp. 551-52, and cited authorities.

[32] *Johnsrud v. Carter,* 620 F.2d 29, 32 (CA 3,1980).

Petitioner Tribe's Reserved Salt River Rights Are Interests in Real Property of the Highest Dignity.[33] It is elemental that Petitioner Tribe's reserved rights in the Salt River are part and parcel of the lands which comprise the Fort Apache Indian Reservation.[34] To preserve and to protect those reserved rights to the use of water in the Salt River, Petitioner Tribe is fully within its rights to initiate an action to have resolved the conflict with the Secretary of the Interior, who, as Petitioner Tribe has repeatedly declared, is acting illegally. This Court, in *Ickes v. Fox,* declared that where, as here, the Secretary of the Interior is violating vested rights, the District Court has jurisdiction to resolve the controversy.[35] The rationale of *Ickes v. Fox* is particularly relevant here. In that case, the Court declared that the action initiated to preserve and protect vested rights was not against the United States where the Secretary of the Interior, as here, is acting beyond the scope of his authority and in so doing is violating vested property rights. As will be reviewed, the Court of Appeals was in grave error when it totally recast, restructured, and, in effect, rewrote the complaint filed by Petitioner Tribe declaring that the action was against the United States of America, while simultaneously denying Petitioner Tribe's right to prove in open Court to the contrary.[36]

On repeated occasions, the right to a property owner to be heard by resorting to "equity for protection" against unauthorized actions of an officer of the United States is too clear for serious doubt.[37]

Respondent Hodel and Subordinates Without Power or Authority To Seize Petitioner Tribe's Reserved Rights: An exhaustive investigation has been made to ascertain the source

---

[33] *Wiel, Water Rights in the Western States,* 3d ed., Vol. 1, Sec. 18, pp. 20, 21; Sec. 283, pp. 298-300; Sec. 285, p. 301; *United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 73 (1913); *Ashwander v. TVA,* 297 U.S. 288, 330 (1936).

[34] *Fuller v. Swan River Placer Mining Co.,* 12 Colo. 12, 17; 19 Pac. 836 (1898); *Wright v. Best,* 19 Cal.2d 368; 121 P.2d 702 (1942); *Sowards v. Meagher,* 37 Utah 212; 108 Pac. 1112 (1910); *Lindsey v. McClure,* 136 F.2d 65, 70 (CA 10, 1943).

[35] 300 U.S. 82, 96, *et seq.* (1937)

[36] Appendix a, 784 F.2d 921, 923, ftn. 2 (1986).

[37] *Philadelphia Co. v. Stimson,* 223 U.S. 605, 621 (1912).

of the power being exercised by the Secretary of the Interior to control all of the waters of the Salt River on the Fort Apache Indian Reservation and to commit those waters to the benefit of the Salt River Federal Reclamation Project. There is a total lack of authority to deprive Petitioner Tribe of its *Winters* Doctrine rights, so essential for Petitioner Tribe's present and future economic development. Absent specific authority conferred by Congress upon the Secretary of the Interior, there is no power pursuant to which the Secretary can confiscate and take from Petition Tribe its reserved rights.

On the subject of the power of the Secretary, over Indian property interests, the Court said this in its Shoshone opinion:

> The only way in which the Shoshones could lawfully have been deprived of the use and occupancy of [their lands] was through the exercise of the power of eminent domain . . . *The Government will not be deemed to have exercised that power merely because some unauthorized officer takes possession* [as here].[38]

In support of that conclusion, the Court decided the critical case of *United States v. Creek Nation.*[39] Broad powers reside in the Secretary of the Interior as the principal agent of the United States Trustee for Petitioner White Mountain Apache Tribe. Those broad powers may be exercised to administer the Tribe's property solely for Tribe's benefit.[40] *Shoshone* is authority for the proposition that the Secretary in managing Petitioner Tribe's property for Tribe's "betterment." The Secretary does not have the power

> '. . . to give the tribal lands to others, or to appropriate [as here] them to its own purposes without rendering, or assuming an obligation to render, just

---

[38] *Shoshone Tribe v. United States,* 299 U.S. 476, 482 (1937). (Emphasis supplied)

[39] 295 U.S. 103, 110 (1935).

[40] *See* Bogert, The Law Of Trusts And Trustees, Rev. 2d ed., 1978, § 543, p. 197. "Trustee's Duty Of Loyalty To Beneficiaries," and cited authorities; see, Vol. 2, Scott, Law Of Trusts, "Duties Of The Trustee," § 169, p. 1297; Vol. I, Restatement Of The Law Of Trusts Second, § 170, "Duty Of Loyalty."

compensation . . .; for that "would not be an act of guardianship, but an act of confiscation." '[41]

CONSUMMATION OF SECRETARIAL FRAUD IN STATE COURT W-1 PROCEEDINGS

There has been reviewed above the irreconcilable conflict between Petitioner White Mountain Apache Tribe and Respondent Hodel arising from their conflicting claims to the Salt River rights to the use of water. As a consequence, perhaps the most critical issue raised in Petitioner Tribe's complaint was whether, under the circumstances presented here, Petitioner Tribe's rights could be taken into the State Court W-1 Proceedings pursuant to 43 U.S.C. 666, the McCarran Amendment until the controversy between Petitioner Tribe and Respondent Secretary is resolved.[42]

State Court W-1 Proceedings: There was initiated on April 26, 1974 by the Salt River Water Users' Association, the agency that administers the Salt River Federal Reclamation Project for the Secretary of the Interior, an action now in the Superior Court of Maricopa County, State of Arizona, to adjudicate all of the rights to the use of water in the Salt River above Granite Reef Dam.[43] Throughout this Petition, that action is referred to as the Court W-1 Proceedings.

Petitioner Tribe's Unvarying Resistance to the Water Rights Claim Filed in the State Court W-1 Proceedings: There is attached to Petitioner Tribe's complaint a copy of the Water Rights Claim that was prepared by Respondent Hodel and subordinates for filing in the State Court Proceedings initiated by the Salt River Valley Water Users' Association, which administers the Secretarial Salt River Federal Reclamation Project for the Secretary of the Interior.[44] With reference to that Water Rights Claim of the United States as Trustee for the

---

[41] *Shoshone v. United States*, 299 U.S. 476, 497 (1937).

[42] Appendix E., Complaint, p. 46, Para. XCVI, *et seq.*

[43] *Ibid.*, p. 53, Para. CXIV.

[44] Appendix E, Complaint and the "Water Rights Claim" prepared reportedly on behalf of Petitioner Tribe is Appendix E of Petitioner Tribe's Complaint.

White Mountain Apache Tribe, there is set forth in the Complaint Petitioner Tribe's rejection of that Water Rights Claim.[45] There was likewise filed with the Complaint Petitioner Tribe's Resolution adopted by the Tribal Council, the governing body of the Tribe, on March 9, 1982.[46] In that Resolution, Petitioner Tribe, predicated upon an intensive investigation by Petitioner Tribe's experts in hydrology, soils, and geology, charged that the Water Rights Claim was flagrantly, false, grossly inadequate, and was prepared on the basis of information which the Tribe, if afforded the opportunity, would prove to be contrary to fact.

State Court W-1 Proceedings in its Infancy:[47] There was entered in the State Court W-1 Proceedings on August 5, 1985, an Order extending the time for filing claims in the Consolidated Proceedings W-1 Lower Gila River until January 20, 1987.[48] Petitioner Tribe filed with the Court of Appeals on November 27, 1985 a copy of the Order extending filing dates until January 20, 1987. Likewise filed with the Appellate Court, with its Emergency Motion, was a copy of the "Water Rights Claim," which was filed in the State Court W-1 Proceedings, purportedly on behalf of Petitioner Tribe on November 29, 1985.[49] There was likewise filed with the Court of Appeals for the Ninth Circuit Petitioner Tribe's objections to the Water Right Claim, supported by affidavits, establishing that the Water Rights Claim was drafted in a manner that would effectuate the Secretarial intentional denigration of Petitioner Tribe's Salt River rights for the benefit of the Salt River Federal Reclamation Project.[50] On November 29, 1985, the Court of Appeals for the Ninth Circuit denied Petitioner Tribe's Emergency Motion.[51]

---

[45] *Ibid.*, p. 58, para. CXXII.

[46] *Ibid.*, Attachment to Complaint Appendix F.

[47] Appendix F, Petitioner Tribe's Emergency Motion, filed November 27, 1985.

[48] State Court W-1 Proceedings Order, entered August 5, 1985, Appendix A of Appendix F.

[49] Appendix F. (*See* Appendix C, 784 F.2d 921 at p. 923).

[50] *Ibid., see* Affidavit of Thomas Michael Watson.

[51] Appendix G.

ARGUMENT

REASON FOR GRANTING PETITION FOR WRIT OF CERTIORATI

COURT OF APPEALS' ERRONEOUS OPINION DEPARTS FROM ACCEPTED COURSE OF JUDICIAL PROCEEDINGS [52] AND ADVERSELY IMPACTS FEDERAL-STATE-TRIAL JURISDICTION

The Companion Case:[53] Issues in the companion case, referred to below are markedly contained in this action.[54] However, due to the Order of the District Court granting summary judgment, which is implemented by a permanent injunction against Petitioner Tribe involving genuine, highly controversial critical facts which pertain to the Fort Apache Indian Reservation. Stressed here, moreover, is the fact that the subject *res* in both cases is the Petitioner Tribe's reserved Salt River rights.

Appellate Court Departs Sharply from the Court's Opinions and Its Own Opinions: It is respectively urged that the Court of Appeals in the opinion presented here for review departs drastically from the principles of law repeatedly applied by the Court and indeed by the Court of Appeals itself. The Court of Appeals in its opinion correctly states that Petitioner Tribe does not name the United States of America as a party.[55] The Court of Appeals nevertheless without a scintilla of evidence before it declared:

> We construe such an action as one taken against the United States itself.[56]

In support of its conclusion that Petitioner Tribe was proceeding against the United States, the Court of Appeals in grave

---

[52] Rule 17, Jurisdiction on writ of certiorari.

[53] (604 F.Supp. 464 (U.S.D.C.D. Ariz. 1984); 784 F.2d 917 (CA 9, 1986).

[54] Appendix E. Complaint, p. 50, para. CV.

[55] Appendix C, *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 923 (CA 9, 1986).

[56] *Ibid.*

error, cites as its authority, the decision of *Dugan v. Rank* [57]. As can be seen from Tribe's complaint, extensively reviewed above,[58] Petitioner Tribe has charged in explicit terms that successive Secretaries of the Interior, including the incumbent Respondent Secretary Hodel and subordinates, (1) have consistently and illegally mismanaged the Fort Apache Indian Reservation for the purpose of enhancing the flow of the Salt River and its tributaries away from Petitioner Tribe's Reservation; (2) have intentionally and illegally destroyed Petitioner Tribe's grazing lands with the consequence that—although the runoff from the Salt River and its tributaries away from Petitioner Tribe's Reservation has been vastly accelerated for the benefit of the Salt River Federal Reclamation Project—Petitioner Tribe's Reservation is being literally washed away by sheet and gully erosion; and (3) Respondent Hodel and subordinates are presently illegally and intentionally overcutting Petitioner Tribe's forests to enhance Salt River flow away from the Reservation by upwards to 90 percent of growth in clear violation of the sustained-yield mandate imposed by Congress upon the Secretary of the Interior pursuant to 25 U.S.C. 466. This Court, in its *Bracker* decision [59] reviewed in explicit detail the Secretarial obligation properly to manage Petitioner Tribe's forests. That Respondent Donald P. Hodel and named subordinates are now and have been vastly illegally overcutting Petitioner Tribe's forest to the point of destruction is not subject to serious challenge, all as alleged in Petitioner Tribe's complaint.[60]

In sharp contrast to this case in which Petitioner Tribe has been summarily denied a moment in court to prove intentional, fraudulent mismanagement of its Reservation for the benefit of the Secretarial Federal Reclamation Project, there was approximately 200 days of trial in *Dugan v. Rank* in which it was

---

[57] 372 U.S. 609, 620 (1963).

[58] *Supra.*, at p. .

[59] *White Mountain Apache Tribe, et al., v. Bracker, et al.*, 448 U.W. 136, 145 (1980).

[60] Appendix E, Complaint, p. 37, para. LXXVII, *et seq.*, "Mismanagement of Forest Operations [by the Secretary of the Interior] to Increase Runoff."

unequivocally established by an abundance of evidence that Congress had fully authorized the construction of the Central Valley Reclamation Project, and had provided in great detail the methods pursuant to which the Central Valley Project was to be administered. Whereas here, as in *Scheuer v. Rhodes,* the only thing before the Court is Petitioner Tribe's complaint explicitly alleging a total lack of authority in Respondent Secretary Hodel and subordinates intentionally to mismanage Petitioner Tribe's Salt River rights, which stands admitted in the record. In the *Dugan* decision, relying on *Larson v. Domestic & Foreign Commerce Corporation.,*[61] the Court declared that:

> "The decree [prayed for in that case] would require the United States—contrary to the mandate of the Congress—to dispose of valuable irrigation water and deprive it of the full use and control of its Reclamation facilities." [62]

For the Court of Appeals to "construe" that, contrary to the facts that are before it, that the Tribe is proceeding against the United States of America is plain, serious, and it is respectfully urged, reversible error. As stated in *Scheuer* above,[63] the District Court cannot summarily dismiss Petitioner Tribe's complaint, as it pertains to Petitioner Tribe's Salt River rights pursuant to its Rule 54(b) Order.[64]

It is denied that a decree granting Petitioner Tribe the relief for which it prays in this proceeding would ". . . expend itself on the public treasury or domain, or interfere with the public administration." [65] Prohibiting Respondent Hodel and subordinates from illegally administering Petitioner Tribe's reserved rights in the Salt River for the benefit of the Salt River Federal Reclamation Project would not, indeed could not, interfere with agents of the United States acting within the scope of their authority.

---

[61] 337 U.S. 362 (1949).

[62] *Dugan v. Rank,* 372 U.S. 609, 621 (1963).

[63] *Supra.,* at p. 11 *et seq.*

[64] Appendix B.

[65] *Land v. Dollar,* 330 U.S. 731, 734 (1947).

Most assuredly the facts in *Dugan* establish that officials were acting within the mandate of Congress. Here, Respondent Hodel and subordinates are knowingly acting in violation of Petitioner Tribe's vested Salt River rights, which were severed by the District Court from pursuant to Rule 54(b) and dismissed.

In *Land v. Dollar,*[66] there has been extensively reviewed the principles which, it is respectfully urged, will govern here. In that case, the Court declared this principle:

> Where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of *United States v. Lee, supra,* has been repeatedly approved . . . That rule is applicable here although we assume that the record title to the shares is in the Commission. In *United States v. Lee, supra,* record title to the land was in the United States and its officers were in possession. The force of the decree in that case was to grant possession to the private claimant. Though the judgment was not *res judicata* against the United States . . . it settled as between the parties the controversy over possession. Precisely the same will be true here, if we assume the allegations of the complaint are proved.

Continuing, the Court declares in *Land v. Dollar:*

> But public officials may become tort-feasers by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relagated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.[67]

---

[66] 330 U.S. 731, 738 (1947).

[67] *Ibid.,* at p. 731, 737-738.

The analysis in *Land v. Dollar* of the Court's decision in *United States v. Lee,*[68] is most relevant. In Lee, the Plaintiff was afforded an apportunity to be heard—not so here. In that case, the Court held that:

> The assertion by officers of the Government of their authority to act did not foreclose judicial inquiry into the lawfulness of their actions; that a determination of whether their 'authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question.' [69]

The Court of Appeals Departs Radically from its Own Decisions: There has been referred to above the case of *Ickes v. Fox* [70] in which it was held that a proceeding against the Secretary of the Interior for unauthorized acts was not against the United States. That decision and numerous others are cited by the Court of Appeals in *Washington v. Udall,*[71] referring to the thorough study of the *Larson-Malone-Dugan* trilogy, and to the Ninth Circuit's decision in *Turner v. Kings River Conservation District* [72] and concludes that although the suit would appear to be one against the sovereign:

> '. . . the action is nonetheless maintainable against government officials under the two "exceptions" to the "general rule" if the acts of the officers were prohibited by statute or the Constitution.' [73]

Moreover in *Washington v. Udall,* the Court concluded within the exceptions of *Larson*—unauthorized acts—that there appeared to be "no reason pertaining to sovereign immunity why the District Court should not consider the State's complaint on its merits in order to determine whether the Secretary of the Interior or his subordinates have exceeded their statutory authority. . . " [74] respecting the issues there presented. In this

---

[68] 106 U.S. 196, 218-18 (1882).

[69] *Ibid.*

[70] 303 U.S. 82 (1937).

[71] 417 F.2d 1310, 1317-18, 1320 (CA 9, 1969).

[72] 300 F.2d 184, 189 (1966).

[73] *Ibid.,* at p. 190.

[74] *Washington v. Udall,* 417 F.2d, 1310 1319 (CA 9, 1969).

case, the Court of Appeals ignores those concepts and, irrespective of the explicit language of the complaint charging the officials as individuals with illegal conduct, the Court of Appeals declares that the action initiated will be construed as being against the United States and renders its opinion to that effect.

The Court of Appeals Totally Misconceives the Language of and the Interpretations Placed upon the McCarran Amendment, 43 U.S.C. 666: The factors giving rise to the opinion of the Court of Appeals in this case are difficult to comprehend. The Court of Appeals chronicles the resistance of Petitioner Tribe to the preparation of the "Water Rights Claim" by the Secretary of the Interior and likewise chronicles the objections of Petitioner Tribe to the filing of that Water Rights Claim in the State Court W-1 Proceedings.[75] At all times Petitioner Tribe has asserted to the United States Court of Appeals, to the District Court, and repeats and reiterates its position to the Court that 43 U.S.C. 666, the McCarran Amendment, has no application whatsoever to Petitioner Tribe's charges that Respondent Hodel and subordinates have illegally, fraudulently, and wholly without authority attempted to confiscate Petitioner Tribe's Salt River reserved rights for the benefit of the Salt River Federal Reclamation Project.[76] Genesis of the opinion of the Court of Appeals can only be explained by that Court's erroneous assertion that, although Petitioner Tribe did not name the United States, the action was nevertheless construed by the Court "... as one taken against the United States itself."[77] Predicated upon that misconception, the Court of Appeals, totally ignores the fact that Tribe's ongoing conflict is not with the United States but with Respondent Hodel individually, and does not come within the purview of the McCarran Amendment. Irrespective of that fact, the Appeals Court asserts that: "The Tribe persists in misconstruing the McCarran Amendment and the decisions applying it."[78] Thereafter the Appellate Court, without referring to the fact that the conflict between

---

[75] Appendix C, *White Mountain Apache v. Hodel,* 784 F.2d 921, 922, *et seq.,* (CA 9, 1986).

[76] *Supra.,* at p. 13 *et seq.*

[77] Appendix C, at p. 923, ftn. 2. (Petitioner Tribe v. Hodel).

[78] *Ibid.,* at p. 924.

Petitioner Tribe and Respondent Hodel is not a "general adjudication proceedings" within the purview of the McCarran Amendment, declares that:

> "The State Court does have the authority to adjudicate tribal water rights in W-1. The Congress has said so, *see* McCarran Amendment, 43 U.S.C. 666, the United States Supreme Court has said so . . . and we have said so . . . It is time that the Tribe accepts the proposition as true." [79]

With all due respect to the Court of Appeals, Petitioner Tribe makes this statement to this Court: The action initiated by Petitioner Tribe against Respondent Hodel and his subordinates—not the United States of America—does not remotely resemble, does not remotely parallel, and cannot properly be tortured into being a "general adjudication" suit within the purview of the McCarran Amendment. The Court in *Dugan v. Rank* established the parameters of the McCarran Amendment when it explicitly enunciated the concept that:

> It is sufficient to say that the provisions of the McCarran Amendment relied on by respondents and providing that the United States may be joined in suit 'for the adjudication of rights to the use of water of a river system or other source,' is not applicable here.[80]

From *Colorado River* this excerpt is taken, quoting from Senator McCarran, who sponsored the legislation:

> The legislation was not 'intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all the rights of various owners on a given stream.' [81]

In *Arizona v. San Carlos* [82] the Court explicitly rejects any departure from the concepts of *Colorado River,* belying any effort by the Court of Appeals to expand the objectives of the

---

[79] *Ibid.*

[80] *Dugan v. Rank,* at p. 372, U.S. 609, 618 (1963).

[81] *Colorado River Conservation District v. United States,* 424 U.S. 800, 808 (1976).

[82] 463 U.S. 545, 569 (1983).

McCarran Amendment to include actions by Indian Tribes involving charges of fraud against Respondent Hodel and his subordinates. Rationale of *Arizona v. San Carlos* is to preserve the independence of Indian Tribes from state jurisdiction in controversies of the nature of this case, by utilizing these terms:

> Nothing we say today should be understood to represent even the slightest retreat from the general proposition we expressed so recently . . . 'Because of their sovereign status, [Indian] tribes and their reservation lands are insulated in some respects by a "historic immunity from state and local control" . . . and tribes retain any aspect of their historical sovereignty not "inconsistent with the overriding interest of the National Government." '

Continuing, the Court then added:

> Nor should we be understood to retreat, from the general proposition, expressed in *Colorado River,* that federal courts, have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.' [83]

Congress has not by the McCarran Amendment relegated the controversy between Petitioner Tribe and Respondent Hodel to the state courts. It is elemental that Petitioner Tribe is immune from suit.[84] As a consequence, it is impossible to perceive the predicate upon which the Court of Appeals has declared that the controversy between Petitioner Tribe and Respondent Hodel could be relegated to the state court. Nevertheless, that is the express declaration by the Appellate Court when it declares that the State Court W-1 Proceeding ". . . does have the authority to adjudicate . . ." the controversy between Petition Tribe and Respondent Hodel. Any question about that interpretation of the opinion of the Court of Appeals is removed by this declaration in the companion decision in which the Court of Appeals is removed by this declaration in

---

[83] *Ibid.*, 570, 571.

[84] *White Mountain Apache Tribe v. Shelly,* 107 Ariz. 4; 480 Pac. 2d 654 (1971).

the companion decision in which the Court of Appeals emphasizes that:

> We likewise reject the Tribe's contention that, because the water rights claim filed by the government on the Tribe's behalf is 'fraudulent,' the employees covered by the Tribal Court injunction were not acting within the scope of their duties as federal officers.

Thereafter the Court of Appeals—it is respectfully suggested—makes this erroneous statement:

> It is now beyond dispute that the state courts of Arizona have jurisdiction to adjudicate the water dispute at issue here [irrespective of the fraud factor which permeates all aspects of this litigation].[85]

Continuing in disregard of the fraud factor, the Court of Appeals states that, irrespective of Petitioner Tribe's contentions against Respondent Hodel and subordinates, those contentions do not divest "... the Arizona courts of jurisdiction ..." [86]

Petitioner Tribe's Action Charging Fraudulent Misconduct Is Not Within the Purview of the McCarran Amendment: Petitioner Tribe's immunity from suit in state court absent a specific mandate from Congress is total. That concept is underscored by the Court in *Santa Clara Pueblo:* [87]

> Indian Tribes have long been recognized as possessing the common-law immunity from suit ... 'Without Congressional authorization,' the 'Indian Nations are exempt from suit.'

Most importantly here, the Court added this statement:

> It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' [88]

---

[85] *United States v. White Mountain Apache Tribe, et al,* 784 F.2d 719, 720 (CA 9, 1986).

[86] *Ibid.*

[87] *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978).

[88] *Ibid.*

Continuing to examine the provisions of the Indian Civil Rights Act that was before it, the Court declared the principles that are governing:

> In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by sovereign immunity from suit.[89]

Continuing, the Court reviewed the governing principles, overlooked by the Court of Appeals, stressing that the Tribe's immunity from suit cannot be altered or changed:

> "... unless and until Congress makes clear its intension to permit the additional instrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize action for declaratory or injunctive relief against either the tribe or its officers." [90]

The Court is requested to apply to Petitioner Tribe the principles of *United States v. Sherwood* [91] and to declare that Petitioner Tribe's action against Respondent Hodel is not within the purview of the McCarran Amendment, stressing in that regard that waivers of immunity from suit are to be strictly construed.[92]

---

[89] *Ibid.*, at p. 59.
[90] *Ibid.*, at p. 72.
[91] 312 U.S. 586 (1930).
[92] *Ibid.*

CONCLUSION

As reviewed above, the State Court W-1 proceedings is in its infancy. Service of process is still ongoing in the colossal State Court W-1 and consolidated proceedings. Cognizance is taken in *Arizona v. San Carlos* that in 1983 service had been accomplished on 58,000 known water claimants, and filings are not required on the Lower Gila River until January 20, 1987. It is reasonably anticipated that the proceedings in question will continue for at least a half century.

Accordingly, Petitioner Tribe respectfully prays the Court to grant this Petition, affording Petitioner Tribe an opportunity to present to the Court the imperative need for Petitioner Tribe to be heard in the District Court respecting its controversy with Respondent Secretary Hodel which is not within the McCarran Amendment.

Respectfully submitted,

William H. Veeder
818 18th Street, N.W. #920
Washington, D.C. 20006
(202) 466-3890

Attorney for Petitioner
White Mountain Apache Tribe

Dated: September 2, 1986

Supreme Court, U.S.
FILED
SEP 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

86-375

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE WHITE MOUNTAIN APACHE TRIBE, a body corporate established pursuant to 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476) and duly recognized by the Secretary of the Interior,

Petitioner,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, DONALD P. HODEL, *et al.*

Respondents

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM H. VEEDER
Suite 920
818 18th Street, N.W.
Washington, D.C. 20006
(202) 466-3890

Attorney for
White Mountain Apache Tribe
Petitioner

APPENDICES INDEX

		Page
APPENDIX A:	Opinion, *The White Mountain Apache tribe,* Plaintiff, v. *William P. Clark* [*Hodel*], *et al,* Defendants, 604 F.Supp. 185 (1984)	1a
APPENDIX B:	February 15, 1985 Rule 54(b) Judgment	1b
APPENDIX C:	Opinion, *White Mountain Apache Tribe,* Plaintiff, *v. Donald P. Hodel, et al.,* 784 F.2d 921 (CA 9, 1986)	1c
APPENDIX D:	June 3, 1986 Order denying petition for rehearing and suggestion for rehearing *en banc*	1d
APPENDIX E:	Complaint for Declaratory Judgment and for Permanent Injunction, *The White Mountain Apache Tribe,* Plaintiff *v. James G. Watt* [*Hodel*], *Secretary of the United States Department of the Interior, et al.,* Defendants	1e
APPENDIX F:	Emergency Motion To Preserve and To Protect this Court's Jurisdiction and To Prevent Irreparable and Continuing Damage to Plaintiff/Appellant White Mountain Apache Tribe with Supporting Affidavits	1f
APPENDIX G:	Order dated November 29, 1985 denying Emergency Motion	1g

APPENDIX A

United States District Court,
D. Arizona.

No. CIV 83-2045 PCT CAM.

The WHITE MOUNTAIN APACHE TRIBE, *Plaintiff,*

v.

William P. CLARK, et al., *Defendants.*

Oct. 12, 1984.

Russell A. Kolsrud, Asst. Atty. Gen., Phoenix, Ariz., for Corbin.

G. Eugene Neil, Phoenix, Ariz., for Goodfarb.

Richard S. Allemann, Asst. U.S. Atty., Phoenix, Ariz., and Pauline H. Milius, U.S. Dept. of Justice, Washington, D.C., for federal defendants.

ORDER

MUECKE, *Chief Judge.*

Having received and considered Plaintiffs' Complaint for Declaratory Judgment and for Permanent Injunction, filed October 20, 1983; Federal Defendants' Motion to Dismiss, filed February 9, 1984; Plaintiffs' Response to Motion to Dismiss, filed March 30, 1984; Defendants' Reply Memorandum in Support of Federal Defendants' Motion to Dismiss, filed April 10, 1984; Federal Defendants' Supplemental Memorandum in Support of Motion to Dismiss, filed June 14, 1984; Plaintiffs' Memorandum Pursuant to May 11, 1984 Order, filed June 21, 1984; Federal Defendants' Final Memorandum in Support of Motion to Dismiss, filed July 16, 1984; and Plaintiffs' Response

to Federal Defendants' Supplemental Memorandum, filed July 16, 1984; and having heard oral argument on the Motion on April 16, 1984, this Court finds and concludes as follows:

This action is a continuation of a long history of disputes between the United States Government and Indian Tribes located in the various states across the country. Many of these claims, including the one before this Court, consist of alleged wrongs inflicted upon the tribes since the time pioneers first ventured across the Western Plains. While it is clear that the Indians were previously quite limited in their access to the judicial system to seek redress for these wrongs, times have indeed changed.

In 1946, Congress created the Indian Claims Commission and vested it with jurisdiction "[b]road enough to include all possible claims." Act of August 13, 1946, Pub.L. No. 726, 1946 U.S.Code Cong.Serv. (50 Stat.) 1347, 1355 (hereinafter cited as *Congressional Comments*). The language of the Act, 60 Stat. 1049, 25 U.S.C. § 70 *et seq.* (1976), illustrates the breadth of the jurisdiction:

> Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity, (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of

compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

It is obvious that Congress intended to cover *all* claims: "If any class of claims is omitted, we may be sure that sooner or later that omission will lead to appeals for new special jurisdictional acts." *Congressional Comments, supra,* at 1355-1356.

Therefore, based upon the grant of jurisdiction in the Act as well as its legislative history, all claims arising prior to 1946 were to have been brought before the Indian Claims Commission or were forever barred. See 60 Stat. 1049, 1052. The above discussion is dispositive of one of the issues before this Court.

Plaintiff makes several allegations in its complaint. First, the Tribe claims that the Secretary of Agriculture has refused to restore approximately 14,000 acres to which it believes it is entitled.

The White Mountain Apache Reservation was granted to the Tribe by Executive Orders on November 9, 1871 and December 12, 1872. The northern boundary of the reservation borders what are now the Sitgreaves and Apache National Forests. In 1887, Deputy Surveyor C. Wallace, under contract with the United States Government, surveyed the area, thereby delineating the boundary of the reservation. The reservation, as originally defined by the above orders, was reduced several times after its creation by various Executive Orders until the early 1900's.

Plaintiff here alleges that the Wallace Survey of 1887 erroneously excluded from the reservation 14,00 acres of land, which is now National Forest area. As previously mentioned, the Indian Claims Commission was created in 1946 for the express purpose of providing a forum for all Indian grievances against the Federal Government.

In 1959, Plaintiff availed itself of this opportunity to seek redress for the previous alleged wrongs committed upon the

Tribe by the United States; namely, the loss of properties contained within and without the present White Mountain Apache Reservation (*see* Plaintiffs' Complaint filed before the Indian Claims Commission, hereinafter referred to as "Docket No. 22-D", attached as Exhibit 1 to Federal Defendants' Supplemental Memorandum in Support of Federal Defendants' Motion to Dismiss, filed June 14, 1984). Shortly thereafter, Plaintiff filed a second action alleging trespass and mismanagement, and requested an accounting (see Exhibit 4, attached to Federal Defendants' Supplemental Memorandum in Support of Federal Defendants' Motion to Dismiss, filed June 14, 1984, hereinafter referred to as "Docket No. 22-H"). This second action has survived the extinguishment of the Indian Claims Commission and is presently pending in the United States Claims Court.

Subsequent to the filing of the two complaints before the Indian Claims Commission, Plaintiffs requested a reconsideration of the boundary lines of the reservation, as described in the allegedly erroneous Wallace Survey. In a memorandum dated June 12, 1967, the Solicitor for the Department of the Interior reviewed this request and after thorough examination, determined that the survey "accurately delineated" the boundary of the reservation and found "no 'gross error' requiring a resurvey." Appendix C, attached to Plaintiffs' Complaint, filed October 20, 1983.

With knowledge of that ruling, Plaintiff continued to pursue its claims in Docket No. 22-D without specific mention of the Wallace Survey boundary dispute. The Indian Claims Commission issued Findings of Fact and an Order in Docket No. 22-D on June 27, 1969. In its Order, the Commission stated, *inter alia,* the following conclusions of law:

> 4. That on May 1, 1873, the United States extinguished, without the payment of compensation, said Indian title to the lands exclusively used and occupied by the Western Apache Indians outside the enlarged White Mountain Indian Reservation established by the Executive Orders of November 7, 1871, and December 14, 1872.

5. That by the Executive Orders of August 5, 1873, July 21, 1874, April 27, 1876, January 26, 1877, March 31, 1877, and December 22, 1902, the United States successively extinguished, without the payment of compensation, said Indian title to lands exclusively used and occupied by the Western Apache Indians inside the said enlarged White Mountain Indian Reservation as of the above dates.

6. That under Sec. 2(4) of the Indian Claims Commission Act plaintiffs are entitled to recover from the defendant on behalf of the Western Apache Indians the fair market value of the area set forth in Finding of Fact No. 11 as of the dates when said Indian title was extinguished by the United States.

Interlocutory Order, June 27, 1969; page 221 of Exhibit 3 attached to Reply Memorandum in Support of Federal Defendants' Motion to Dismiss, filed April 10, 1984.

In order to make this Finding, the Commission necessarily had to focus upon the very Wallace Survey boundary that is at issue in this action. Subsequent to this order, the parties reached in 1972 a Stipulation for Entry of Final Judgment, which provided the Tribe with a settlement in the amount of $4.9 million.

Plaintiff argues here that a taking of the area in dispute could not have occurred solely on the basis of an erroneous survey, and as such, it was not, and could not have been, the subject of a claim before the Indian Claims Commission. Plaintiffs' position is unsound. The Indian Claims Commission did rule that there had been a taking of all lands lying outside of the boundary of the reservation. Conclusion of Law = 4, Interlocutory Order, June 27, 1969, *supra.* That boundary *is* the Wallace Survey boundary. Memorandum of Solicitor, *supra.* Plaintiff did not challenge the Solicitor's ruling in its Docket No. 22-D action. If Plaintiff disagreed with that ruling, the Tribe had knowledge thereof, and could and should have raised the issue in their Docket No. 22-D action. The legislative history of the Indian Claims Commission Act clearly illustrates

that the Commission was created expressly for the resolution of the type of claim Plaintiff attempts to raise here:

> Some Indian claims go back many years in their origins, but the years do not always wipe out past mistakes. Thus, in 1894, a boundary line was drawn around the Warm Springs Reservation in Oregon which was supposed to define accurately the lands guaranteed to the Indians by treaty in 1855. A mistake was made in drawing this line. The result is that there is a piece of national forest which is outside the Indian boundary that should be inside the Indian boundary. There is no dispute about the facts. The Indians look over the erroneous boundary line to the timber and grass on the land that was promised them. The fact that the error was made many years ago does not make the present generation of Indians any less eager to correct a mistake which the Federal Government admits it made but for which no adequate judicial remedy has yet been provided.

Congressional Comments, supra, at 1351.

The Act clearly contemplates, and in fact demands the submission of such claims to the Indian Claims Commission. Plaintiffs brought their claims before the Commission in Docket No. 22-D as well as Docket No. 22-H, just as Congress had intended.

Further, and most significantly, the Stipulation for Entry of Final Judgment in Docket No. 22-D provided that:

> 3. Entry of final judgment in said amount shall finally dispose of *all* rights, claims or demands which the plaintiffs have asserted or *could have asserted* with respect to the subject matter of the suit in Docket No. 22-D, and plaintiffs shall be barred thereby from asserting any such rights, claims or demands against defendant in any other or future action.

Findings of Fact on Compromise Settlement, September 12, 1972; p. 402 of Exhibit 2 attached to Reply Memorandum

in Support of Federal Defendants' Motion to Dismiss, filed April 10, 1984 (emphasis added).

In reaching their settlement, Plaintiff relied upon the allegedly erroneous boundary in obtaining a $4.9 million settlement; it should now be held to such a boundary by its own stipulation as well as under the principles of res judicata.

In summary, the Indian Claims Commission was created for the purpose of hearing *all* Indian grievances arising prior to 1946. The boundary dispute presently before this Court is exactly the type of claim Congress intended the Commission to hear. The present claim arose from a survey occurring in 1887. Plaintiff was not unaware of this boundary dispute during the pendency of its Docket No. 22-D action, as is evidenced by its request for a decision on the matter by the Solicitor for the Department of the Interior. Neither the findings by the Commission nor the stipulation entered into by the parties reflect any dispute by Plaintiff in regard to the boundary of the reservation. Any claims concerning this boundary could and should have been brought in that action. Furthermore, Plaintiff agreed to accept $4.9 million which disposed of "all rights, claims or demands which [the Tribe] asserted or could have asserted. . . ." Plaintiff is barred from bringing this action in Federal Court.

Based upon the above discussion, this Court will grant Defendants' Motion to Dismiss as to the portion of Plaintiff's Complaint concerning the 14,000 acres. Plaintiff's request for injunctive relief to prevent further trespass is therefore denied as moot.

Plaintiff further alleges in its Complaint that the Secretary of the Interior and other federal government officials are unable to adequately represent the Tribe in its water adjudication in the state court due to a conflict of interest between the Government's representation of the Tribe's interest and the representation of the various federal reclamation projects. They allege that the conflict of interest has resulted in gross

mismanagement of the reservation by the Secretary of the Interior, causing serious damage to their lands.[1]

The above issue is well-settled. Two recent decisions by the United States Supreme Court clearly reject any notion of such a conflict of interest. In *Nevada v. United States,* 463 U.S. 110, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983), the Court stated: "The Government does not 'compromise' its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress had obligated it by statute to do." *Id.* at 2906. *See also Arizona v. California,* 460 U.S. 605, 103 S.Ct. 1382, 1396, 75 L.Ed.2d 318 (1983). Thus, Plaintiff has failed to state a sufficient claim upon which relief may be granted regarding any alleged mismanagement due to a conflict of interest in representation by the Government.

The above-cited cases are also germane to the question of Plaintiff's request for an injunction preventing the United States Attorney General from representing the Tribe (as is this

---

[1] In Docket No. 22-H, a pending Court of Claims action, Plaintiff has brought a claim for monetary damages based upon almost identical allegations as those presented herein. The similarity of the claims is reflected in Exhibit 2, attached to the Supplemental Memorandum in Support of Federal Defendants' Motion to Dismiss, filed June 14, 1984, which consists of the Response of Plaintiff White Mountain Apache Tribe to Interrogatories Submitted by Defendant United States of America, filed in Docket No. 22-H. Plaintiff there states:

> To each question, Plaintiff Tribe makes an affirmative reply. Yet the inquiries fail to approach the real issue presented here: Is the United States Trustee liable for the destruction, through its maladministration, of the once fine grazing lands and for the sheet and gully erosion endemic throughout the White Mountain-Fort Apache Indian Reservation which is literally being washed away due to the malfeasance of the Trustee?
>
> The Tribe refers to the law set forth above and declares that there is an absolute liability owing to Plaintiff Tribe which carries with it two obligations: (1) to pay monetary damages for the continuing wrongs, and (2) to rehabilitate and restore the Reservation, all in keeping with the Covenant entered into between Plaintiff Tribe and Vincent Colyer.

In view of the similarity of these claims with those presently before this Court, dismissal of this action does not leave Plaintiff without a possibility of recovery for such claims.

official's duty) in state water adjudications. Plaintiff argues that adequate representation of their water rights is not possible due to a conflict of interest.

The Plaintiff Tribe has previously attempted to bar such representation by filing an action in the United States District Court for the District of Columbia. The Court determined that no statute exists under which the Court could exercise jurisdiction over the Attorney General's exercise of litigating judgment. This decision was affirmed by the Court of Appeals of that circuit in *White Mountain Apache Tribe v. Smith,* 675 F.2d 1341 (D.C. Cir. 1982), cert. denied, *White Mountain Apache Tribe v. Smith,* ____ U.S. ____, 103 S.Ct. 3569, 77 L.Ed.2d 1410 (1983). Based upon the decisions in *Nevada v. United States, supra,* and *Arizona v. California, supra,* regarding conflicts of interest, as well as the decision in the District Court for the District of Columbia which rejected Plaintiff's previous attempt to prevent such representation, that portion of Plaintiff's Complaint requesting injunctive relief prohibiting representation by the Attorney General of the Indian water rights in the state adjudication is dismissed.

In regard to Plaintiff's final claim that the state court has no jurisdiction to adjudicate its federally reserved water rights, this Court awaited the ruling in *Arizona v. San Carlos Apache Tribe of Arizona,* 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983), prior to deciding the case at hand. In that case, the U.S. Supreme Court held:

> [A]ssuming that the state adjudications are adequate to quantify the rights at issue in the federal suits, and taking into account the McCarran Amendment policies we have just discussed, the expertise and administrative machinery available to the state courts, the infancy of the federal suits, the general judicial bias against piecemeal litigation, and the convenience to the parties, we must conclude that the District Courts were correct in deferring to the state proceedings.

Id. at 3215.

This Court, in its Order of May 11, 1984, requested that the parties file supplemental briefs discussing the adequacy of the state court proceedings in adjudicating federal water rights, a question left open by the U.S. Supreme Court in *Arizona v. San Carlos, supra,* 103 S.Ct. at 3215, n. 20. Having considered those briefs, this Court will follow the mandate of the U.S. Supreme Court and the Ninth Circuit Court of Appeals by dismissing this action in favor of a state court determination of jurisdiction. In *Northern Cheyenne Tribe v. Adsit,* 721 F.2d 1187 (9th Cir. 1983), the Ninth Circuit cited and applied the Supreme Court's ruling in *Arizona v. San Carlos, supra,* in stating:

> The question of jurisdiction under state law is one to be definitively resolved by the state courts, as the Supreme Court has held. *Id.* [103 S.Ct.] at 3210, *see also id.* at 3215, n. 21 (contemplating a state court ruling on the jurisdictional question). Any state court desiring to adjudicate Indian water rights would of necessity rule on its jurisdiction to do so; there is thus no need for us, or the district court, to reach that issue. Moreover, the question of adequacy of the state proceedings is one best decided by the state courts in the first instance. This course of actions seems to be what the Court contemplated when it stated, 'State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state court decision alleged to abridge Indian water rights protected by federal law can expect to receive . . . a particularized and exacting scrutiny. . . .' *Id.* at 3216. We therefore will not consider the question of adequacy prior to conclusion of the state court proceedings, and we instruct the district courts to do the same.

Id. at 1188. While it is apparently undecided whether the Tribe will have future access to the federal district court for the purposes of contesting the state court's adjudication, *see Arizona v. San Carlos Apache Tribe of Arizona, supra,* 103 S.Ct. at 3220 (Stevens, J., dissenting), which point of view does not specifically seem to have been disposed of by the majority opinion, the majority opinion in that case did state: "[R]esort to the federal forum should remain available if warranted by a

significant change of circumstances, such as, for example, a decision by a state court that it does not have jurisdiction over some or all of these claims after all." *Arizona v. San Carlos Apache Tribe of Arizona, supra,* 103 S.Ct. at 3215, n. 20.

Pursuant to the mandate set forth in *Northern Cheyenne, supra,* as well as the decision in *Arizona v. San Carlos Apache Tribe of Arizona, supra,* this Court will dismiss Plaintiff's Complaint as to its allegations of lack of jurisdiction in the state court to make determinations concerning federal water rights. Plaintiff may, if it so chooses, attempt to adjudicate such claims of inadequacy before the state tribunal.

In conclusion, this Court will dismiss Plaintiff's Complaint in its entirety, thereby granting Federal Defendants' Motion to Dismiss.

Based upon the foregoing:

IT IS ORDERED that the Federal Defendants' Motion to Dismiss, filed February 9, 1984 is granted. Plaintiff's Complaint, filed October 20, 1983, is dismissed.

APPENDIX B

IN THE

UNITED STATES DISTIRCT COURT

FOR THE DISTRICT OF ARIZONA

THE WHITE MOUNTAIN APACHE TRIBE,
Plaintiff,

v.

WILLIAM P. CLARK, *et al.*,
Defendants.

CIV. 83-2045-PCT-CAM

RULE 54(b)
JUDGMENT

Pursuant to this Court's order dated November 30, 1984, and filed December 3, 1984, and pursuant to Rule 54(b), Federal Rules of Civil Procedure, the Court finds that there is no just reason for delay and accordingly directs that final judgment be entered for the federal defendants on all claims raised in the complaint except plaintiff's mismanagement claim.

Accordingly, it is this 14th day of February, 1985,

ORDERED that all claims raised in the complaint except plaintiff's mismanagement claim are dismissed with prejudice; and it is

FURTHER ORDERED that plaintiff's mismanagement claim is dismissed without prejudice. Plaintiff may file an Amended Complaint as to that claim no later than December 21, 1984; and it is

FURTHER ORDERED that final judgment is entered for federal defendants pursuant to Rule 54(b), Federal Rules of Civil Procedure, on all claims except plaintiff's mismanagement claim.

C. A. MUECKE

C. A. Muecke
Chief Judge

Judgment Approved as to Form only.

William H. Veeder
Attorney for Plaintiff,
White Mountain
Apache Tribe.

APPENDIX C

United States Court of Appeals

NINTH CIRCUIT

No. 85-1721.

WHITE MOUNTAIN APACHE TRIBE,
Plaintiff-Appellant,

v.

DONALD P. HODEL, Secretary; FRANK K. RICHARDSON, Solicitor; JAMES H. STEVENS, Area Director, Bureau of Indian Affairs; *et al.*,
Defendants-Appellees.

Argued and Submitted Nov. 14, 1985.

Decided March 7, 1986.

William H. Veeder, Washington, D.C., for plaintiff-appellant.

Martin W. Matzen, U.S. Dept. of Justice, Washington, D.C., for defendants-appellees.

Appeal from the United States District Court for the District of Arizona.

Before GOODWIN, NELSON and CANBY, Circuit Judges.

CANBY, Circuit Judge:

This is another case in the continuing dispute over Indian rights to water from the Salt River watershed in Arizona. In this appeal, the White Mountain Apache Tribe challenges the

dismissal of several of its claims against officials of the U.S. Department of the Interior. The claims were primarily based on the government's allegedly poor performance as trustee for the Tribe's natural resources. The Tribe characterizes its action as raising one indivisible claim for "mismanagement." We conclude, however, that the complaint actually asserted various claims, several of which are also important to our decision in the companion appeal *United States v. White Mountain Apache Tribe,* 784 F.2d 917 (9th Cir.1986), also decided today.

BACKGROUND

Currently pending before the Superior Court for Maricopa County, Arizona, is the consolidated water rights determination proceeding entitled *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, W-1 through W-4* ("W-1"). The United States is a party to W-1, in part because of its role as trustee for the Tribe and, accordingly, as holder of legal title to any water rights to which the Tribe may be beneficially entitled.

The Tribe, which inhabits the Fort Apache Indian Reservation in Arizona, has a serious interest in the outcome of W-1 because the headwaters of the Salt River, one of the rivers subject to the state adjudication, lie within the Reservation's geographical boundaries. Nonetheless, the Tribe strenuously objects to U.S. government participation on the Tribe's behalf in the Arizona proceeding, has refused to participate in W-1 itself, and has acted on various legal fronts to hamper or prevent the government's filing of a water claim on the Tribe's behalf. This resistance, understandable at first, has by now become an exercise in futility. A brief review of some of the related litigation will help place this case in context.

When W-1 began in 1979, the United States was joined as a party because any comprehensive adjudication of water rights in Arizona necessarily required adjudication of water rights held by the United States, either in its own behalf or as trustee

for Indian tribes. The McCarran Amendment, 43 U.S.C. 666,[1] and the U.S. Supreme Court decision in *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 809-13, 96 S.Ct. 1236, 1242-44, 47 L.Ed.2d 483 (1976), provided strong support for the joinder of the United States as a party. Some questions concerning the Arizona court's jurisdiction and the adequacy of state proceedings in the case remained, however. The jurisdictional question centered on provisions in both the Arizona Enabling Act and the state's Constitution that disclaimed jurisdiction over Indian lands.

Before the United States was served as a party in W-1, several Indian tribes, including the White Mountain Apaches, removed the case to federal court in Arizona. At the same time, several tribes filed independent federal actions seeking adjudication of their water rights. The district court soon remanded W-1 to state court and dismissed all but one of the federal actions, which it stayed pending the outcome of W-1. *See In re Determination of Conflicting Rights to the Use of Water from the Salt River Above Granite Reef Dam,* 484 F.Supp. 778, 784 (D.Ariz.1980), *rev'd,* 668 F.2d 1093 (9th Cir.1982), *reinstated,* 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983). Appeals in the federal actions followed, leading eventually to the decision by the U.S. Supreme Court in *Arizona v. San Carlos Apache Tribe,* 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983). There, the Court held that the McCarran Amendment removed any limitation that statehood Enabling Acts or general federal Indian policy may have placed on state court adjudication of Indian water rights. *Id.* at 563-64, 103 S.Ct. at 3211-12. The Court also held that dismissal or stay of federal water rights actions brought by Indian tribes, pending parallel adjudication in the state courts, was proper under the doctrine of

[1] The McCarran Amendment states, in pertinent part:

(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source . . . where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. . . .

Colorado River Water Conservation Dist. See San Carlos, 463 U.S. at 569-70, 103 S.Ct. at 3214-15.

We enforced the mandate of *San Carlos* on remand in *Northern Cheyenne Tribe v. Adsit,* 721 F.2d 1187 (9th Cir.1983). There, we agreed that the federal actions should be stayed rather than dismissed. We also refused to address two issues raised by the tribes: (1) whether the state courts lacked jurisdiction under state law, and (2) whether the state procedures were adequate to adjudicate the tribes' water rights. We held that the first issue was entirely a matter for the state courts to decide and that the second was for them to decide in the first instance. *Id.* at 1188. The Arizona Supreme Court has since affirmed lower court rulings that state courts have jurisdiction and are an adequate and appropriate forum for the adjudication. *See United States v. Superior Court in and for Maricopa County,* 144 Ariz. 265, 697 P.2d 658 (1985). Over the Tribe's strenuous objections, the United States complied with state court orders to file initial and supplemental water claims on the Tribe's behalf, the latest on November 29, 1985.

As the *San Carlos* litigation progressed, the Tribe brought an action in federal district court in the District of Columbia to enjoin the federal government from filing a claim on the Tribe's behalf in W-1. *White Mountain Apache Tribe v. Smith,* No. 81-1205, slip op. (D.D.C. June 23, 1981), *aff'd mem.,* 675 F.2d 1341 (D.C.Cir.1982), *cert. denied,* 463 U.S. 1228, 103 S.Ct. 3569, 77 L.Ed.2d 1410 (1983). The district court dismissed that case, finding that the court lacked jurisdiction "over the Attorney General's exercise of litigating judgment" and that the Tribe had "an adequate remedy at law in [the W-1 proceeding] subject, as it is, to potential appellate review in the United States Supreme Court." Having failed in the District of Columbia, the Tribe then initiated an action in its own Tribal Court to achieve essentially the same result. The outgrowth of that lawsuit is the companion appeal in *United States v. White Mountain Apache Tribe,* 784 F.2d 917 (9th Cir.1986).

Following the Supreme Court decision in *San Carlos,* the Tribe initiated this action, which, despite the Tribe's protestations to the contrary, is really another collateral attack on the

government's participation in W-1. In this action, the Tribe sought: (1) a declaration that, due to "irreconcilable conflicts of interest," the government [2] had mismanaged water resources belonging to the Tribe in order to increase water available to federal reclamation projects; (2) a declaration that the same conflicts of interest disabled the government from adequately representing the Tribe in any litigation to determine water rights; (3) a declaration that Arizona courts lack jurisdiction in W-1 to determine the Tribe's water rights; (4) an injunction to prohibit the federal government from taking any further action in W-1; and (5) a declaration quieting title to 14,000 acres of land that the Tribe contended were erroneously excluded from an 1887 survey of the Reservation. The district court dismissed with prejudice all claims except the mismanagement claim, which is still pending.[3] We affirm.

DISCUSSION

I. *Partial Judgment Under Rule 54(b)*

The Tribe first contends that its complaint raised but a single claim for mismanagement, rendering partial judgment under Rule 54(b) improper. We review for an abuse of

---

[2] The complaint did not name the United States as a party. Instead, various government officials, including the Secretary of the Interior and the Attorney General, were named defendants. We construe such an action as one taken against the United States itself. *See Dugan v. Rank,* 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963).

Also named as defendants below were various officials of the State of Arizona. These defendants were dismissed by the district court in March 1984, a decision the Tribe does not contest here.

[3] The district court's order of October 12, 1984, originally dismissed with prejudice all claims raised in the Tribe's complaint. *See White Mountain Apache Tribe v. Clark,* 604 F.Supp. 185 (D. Ariz 1984). Following a motion to reconsider, the district court decided to dismiss the mismanagement claim without prejudice, a nonappealable order. *See Haskin v. Morton,* 456 F.2d 1071 (9th Cir. 1972) (per curiam). Then, on February 14, 1985, the court, pursuant to Fed.R.Civ.P. 54(b), entered final judgment dismissing all other claims. The Tribe filed an amended complaint on the mismanagement claim, and it is still pending in district court. All of the other claims are encompassed by this appeal.

discretion. *Alcan Aluminum Corp. v. Carlsberg Financial Corp.*, 689 F.2d 815, 817 (9th Cir. 1982).

Without question, the Tribe approached this lawsuit with a single goal in mind: interference with the government's participation in W-1. Nonetheless, it is clear from the complaint that several distinct issues were raised in the district court. Indeed, in support of its motion for reconsideration, the Tribe characterized its mismanagement claim as separate and distinct from the issues suurounding government participation in W-1. In any event, we do not require that claims covered by a Rule 54(b) judgment be separate from and independent of other claims raised in a complaint. *Id.* There was no abuse of discretion.

II. *State Jurisdiction to Adjudicate W-1*

As it has on numerous occasions in the past, the Tribe here again sought a ruling that Arizona courts had no jurisdiction to adjudicate the Tribe's water rights in W-1. The Tribe persists in misconstruing the McCarran Amendment and the decisions applying it. We find it difficult to respond to the Tribe's contentions at this late date other than to state flatly that the Tribe is wrong. The state court *does* have the authority to adjudicate tribal water rights in W-1. The Congress has said so, *see* McCarran Amendment, 43 U.S.C. § 666; the United States Supreme Court has said so, *see Arizona v. San Carlos Apache Tribe,* 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983); *Colorado Water Conservation Dist. v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); the Arizona Supreme Court has said so, *see United States v. Superior Court in and for Maricopa County,* 144 Ariz. 265, 697 P.2d 658 (1985); and we have said so, *see Northern Cheyenne Tribe v. Adsit,* 721 F.2d 1187 (9th Cir. 1983). It is time that the Tribe accept the proposition as true.

The Tribe has much at stake in W-1. The Arizona courts will be deciding the Tribe's rights to water, probably its most precious resource. It is difficult to see how the Tribe's interest is served by its continued opposition to the presentation of *any* claim for that water to the state courts. Were the Tribe to succeed in its opposition, it might well lose all of its water.

The Tribe makes serious charges in its brief about gross mismanagement of the Tribe's water resources by the government. The Tribe contends that the water claim filed by the government on the Tribe's behalf in W-1 understates the Tribe's proper annual water allocation by tens of thousands of acre-feet. We intimate no view on the merits of these charges; the Tribe's claim for mismanagement is still pending in the district court. We note only that, insofar as these charges affect the amount of water to which the Tribe is entitled, they must be presented to the Superior Court of Maricopa County. If the Tribe is convinced, as it seems to be, that the United States cannot adequately represent the Tribe in W-1, then the remedy is for the Tribe to intervene in that proceeding, as the state courts have indicated that it may do. Should the Tribe fail to convince that court of the correctness of its position, the Tribe will, in due course, have its opportunity to present its contentions to higher state courts and to the United States Supreme Court. *See San Carlos,* 463 U.S. at 571, 103 S.Ct. at 3215-16. That route, rather than one of parallel or collateral proceedings in federal district court, is the proper path for the Tribe to follow in asserting the water rights claims that lie at the heart of this case. The district court therefore was correct to reject the Tribe's attempt to challenge in this proceeding the state court's jurisdiction in W-1.

III. *Conflict of Interests*

The Tribe further contends that, even if the Arizona courts are empowered to adjudicate W-1, the United States should not be allowed to represent the Tribe's water rights due to an "irreconcilable conflict of interests." We likewise reject this contention.

The Tribe argues that, because the United States has its own water claims in the Gila River System and its sources, it has a disabling conflict of interests. The Tribe asserts that the government plans to understate claims for Indian water rights in order to inflate rights ultimately granted to the government's Bureau of Reclamation.

The charge is a serious one, and in light of history, it cannot be dismissed as implausible on its face. Its truth or falsity, however, cannot be determined in advance of the fact. The actual conduct of the W-1 litigation by the government, and its results, are yet to unfold. The Tribe's related contention that the United States is rendered incapable *per se* of representing the Tribe because of its representation of conflicting federal interests finds support in the law of private fiduciaries. The government is not, however, a private fiduciary. The Supreme Court has made clear that the federal government's dual role as trustee for the Indians as well as representative of other federal water interests does not disable it from making water claims for the Indians. In *Nevada v. United States,* 463 U.S. 110, 128, 103 S.Ct. 2906, 2917, 77 L.Ed.2d 509 (1983), the Court declared:

> [I]t is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well. In this regard, the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests . . . . The Government does not "compromise" its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.

See also id. at 140-42, 103 S.Ct. at 1923-24; *Arizona v. California,* 460 U.S. 605, 627-28, 103 S.Ct. 1382, 1395-96, 75 L.Ed.2d 318 (1983).

Of course, the government remains under a firm obligation to represent the Tribe's interests forcefully despite its other representative obligations. *Nevada v. United States,* 463 U.S. at 142, 103 S.Ct. at 2924. The government's failure to do so might well give rise to some claim for breach of duty. But, as we have said, the Tribe's best assurance that its interests will be protected in this unusual proceeding is to avail itself, if there is still time, of the opportunity the Arizona courts have extended to it

to intervene in W-1. *See San Carlos,* 463 U.S. at 566 n. 17, 103 S.Ct. at 3213 n. 17; *supra* Part II.

IV. *Action to Quiet Title*

Finally, the Tribe attacks the district court's dismissal of the Tribe's request to quiet title to some 14,000 acres of land the Tribe claims were erroneously excluded from its Reservation because of a faulty 1887 survey by Deputy Surveyor C. Wallace.[4] The disputed land is now part of the Sitgreaves and Apache National Forests.

The district court dismissed this claim under the doctrine of *res judicata.* After an extensive and cogent review of this dispute, the court concluded that the claim was either settled or foreclosed by proceedings before the Indian Claims Commission in 1972. After an independent review of Commission reports and the pleadings involved, we find we cannot improve upon Judge Muecke's analysis. *See White Mountain Apache Tribe v. Clark,* 604 F.Supp. 185, 187-89 (D.Ariz.1984).

The Indian Claims Commission heard arguments from the Tribe that it had been wrongfully deprived of some lands lying outside its Reservation boundary. After years of hearings, the Commission concluded that the Tribe was correct and that it was entitled to compensation for the fair market value of the lands wrongfully taken. *San Carlos Apache Tribe v. United States,* 21 Ind.Cl.Comm. 189 (1969) ("Docket 22-D"). Three years later, the Commission ratified a settlement in the Tribe's favor for $4.9 million. *San Carlos Apache Tribe v. United States,* 28 Ind.Cl.Comm. 399 (1972). As part of that settlement, the Tribe stipulated to a final judgment that, *inter alia,*

> finally dispose[d] of *all* rights, claims or demands which the [Tribe] asserted or *could have asserted* with respect to the subject matter of the suit in Docket 22-D, and [the Tribe] shall be barred there-

---

[4] This claim was apparently raised in this action either because the Tribe wanted those 14,000 acres included for the purpose of calculating water rights in W-1 or because the exclusion of the land without compensation was another example of alleged government mismanagement of the Tribe's natural resources.

> by from asserting any such rights, claims or demands against [the United States] in any other or future action.

Id. at 402 (emphasis added).

The Tribe now contends that this compensation was for lands outside the Reservation improperly taken, not for lands taken because of error in the 1887 Wallace Survey. For the reasons thoroughly discussed by the district court, this argument must fail. In 1967, at the Tribe's request, the Bureau of Indian Affairs reviewed the Wallace Survey and concluded that it was substantially accurate. The Tribe was well aware of this determination when the Indian Claims Commission began its final resolution of the longstanding claim in Docket 22-D. The only way the Commission could have concluded that land outside the Reservation boundary was taken was by reference to the Reservation boundary as it was established at the time of the Commission proceedings. As the district court put it, "That boundary *is* the Wallace Survey boundary." *White Mountain Apache Tribe v. Clark,* 604 F.Supp. at 188 (emphasis in original). No other reference could have been intended. Thus, the district court's conclusion that the claim is barred, either by settlement or by failure to assert it, is fully supported, and we will not disturb it.[5]

CONCLUSION

We find no error in the district court's disposition of this case. The judgment of the district court is AFFIRMED.

---

[5] Even if the Tribe's quiet title claim were not *res judicata,* it would face additional substantial hurdles that our decision makes it unnecessary to reach. There is a twelve-year limitation period applicable to actions brought under the Quiet Title Act, 28 U.S.C. § 2409a(f); *see Grosz v. Andrus,* 556 F.2d 972, 974 (9th Cir. 1977) (Indian claimants; twelve-year limitation period strictly construed). The Tribe knew no later than June 12, 1967, that the government intended to stand by the Wallace Survey boundary; that was the date the government responded negatively to the Tribe's request to review the Survey's accuracy. The complaint in this case was filed October 20, 1983, more than sixteen years later.

APPENDIX D

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CA No. 85-1721
DC No. 83-2045

WHITE MOUNTAIN APACHE TRIBE,
Plaintiff-Appellant,

-VS-

DONALD P. HODEL, Secretary of the Department of the Interior *et al.*
Defendants-Appellees.

ORDER

(filed June 3, 1986)

BEFORE: GOODWIN, NELSON AND CANBY, CIRCUIT JUDGES

The panel has voted unanimously to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

IN THE

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Civil No. 83-2045 PCT CAM

THE WHITE MOUNTAIN APACHE TRIBE, Fort Apache Indian Reservation, Whiteriver, Arizona, duly organized and established, having been recognized by the Secretary of the United States, Department of the Interior,

Plaintiff,

VS.

JAMES G. WATT, Secretary;* WILLIAM H. COLDIRON, Solicitor, JAMES H. STEVENS, Area Director, Bureau of Indian Affairs; ROBERT N. BROADBENT, Commissioner, Bureau of Reclamation; UNITED STATES DEPARTMENT OF THE INTERIOR; WILLIAM FRENCH SMITH, Attorney General, UNITED STATES DEPARTMENT OF JUSTICE; JOHN R. BLOCK, Secretary, R. MAX PETERSON, Chief of Forest Service, NICK W. MCDONOUGH, Forest Supervisor, UNITED STATES DEPARTMENT OF AGRICULTURE; ROBERT K. CORBIN, Attorney General of the State of Arizona; JOE FALLINI, Commissioner of the Arizona State Land Department; JUDGE STANLEY Z. GOODFARB, Maricopa County Superior Court.

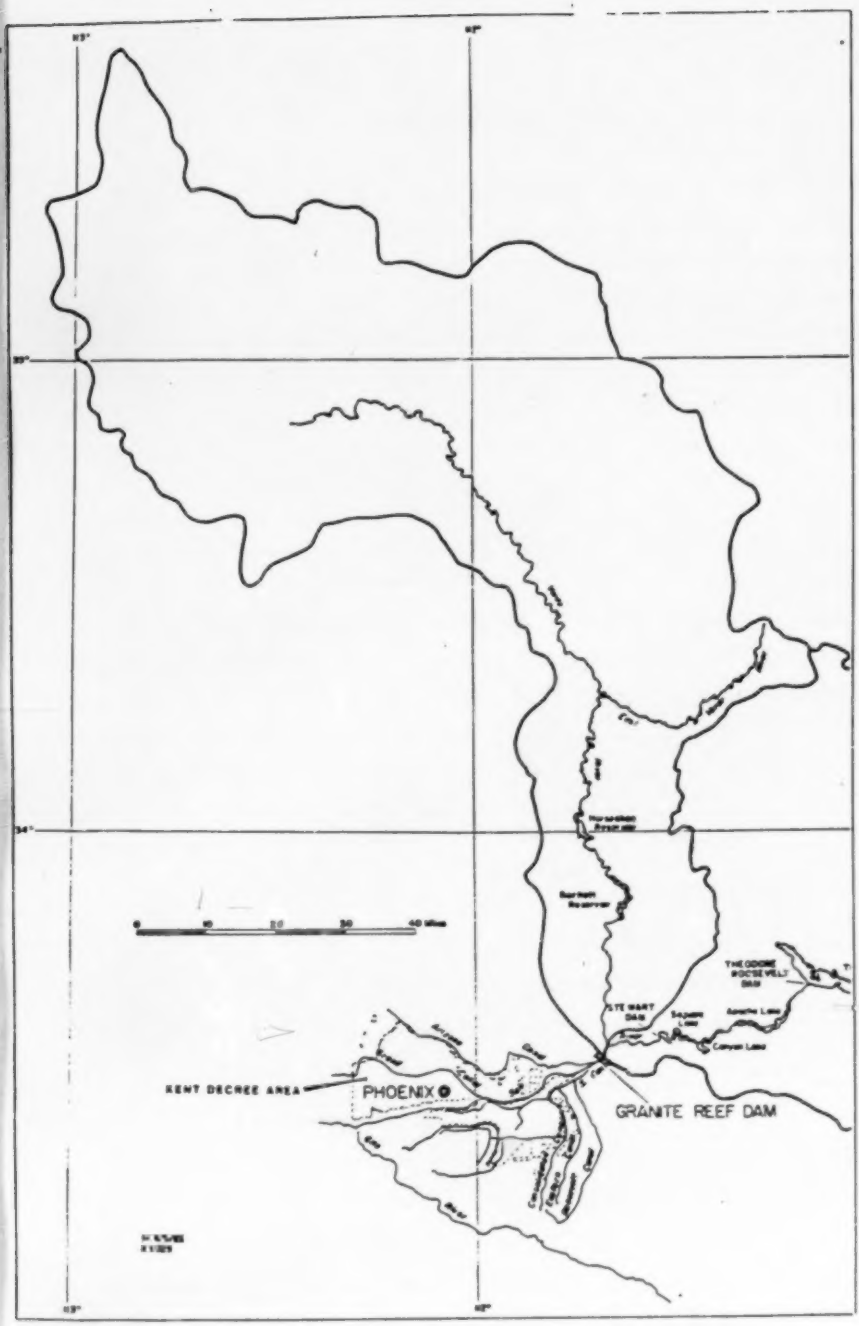
Defendants.

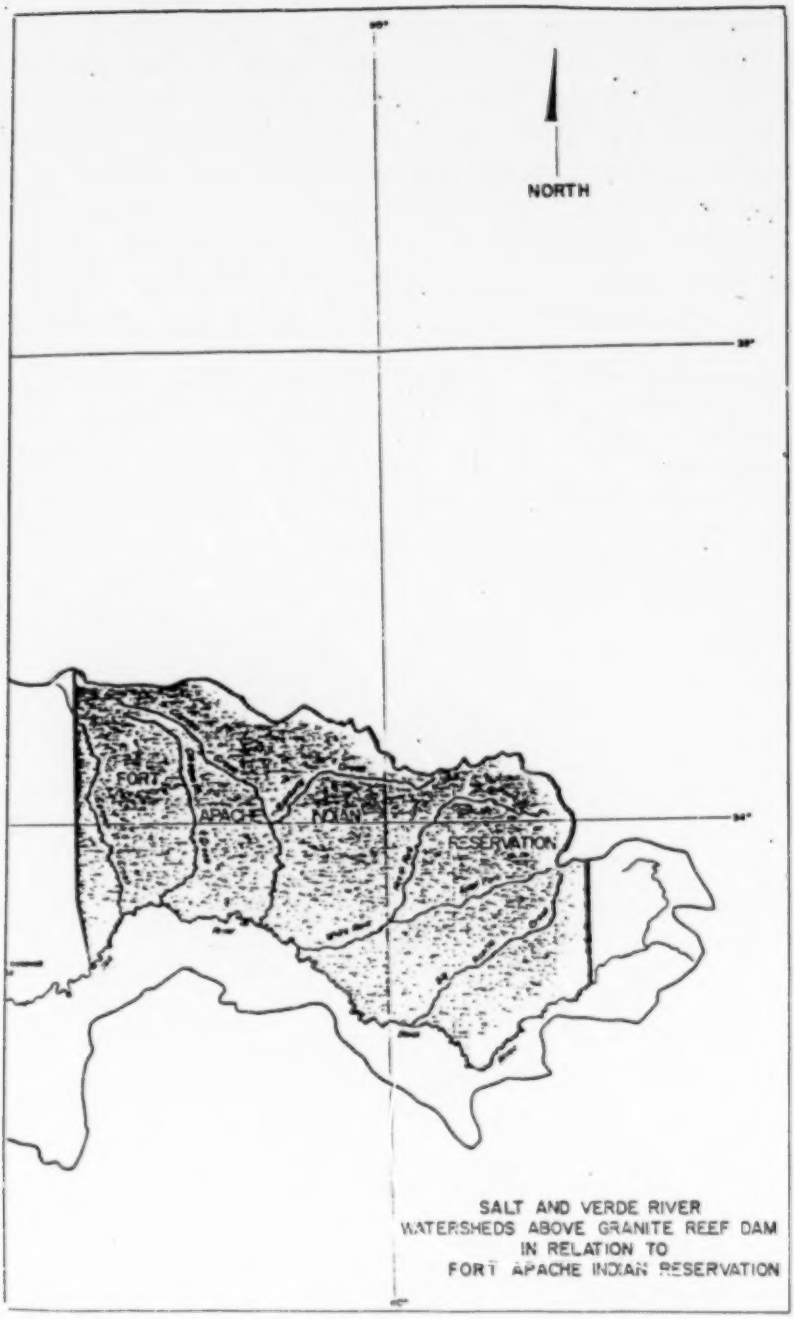
COMPLAINT FOR DECLARATORY JUDGMENT AND FOR PERMANENT INJUNCTION

The Plaintiff White Mountain Apache Tribe, Fort Apache Indian Reservation, Whiteriver, Arizona,[1] the membership of which are citizens of the United States of America, duly organized and established pursuant to its Constitution and By-laws, formulated and adopted by the White Mountain Apache Tribal Council, governing body of that Tribe, and having been duly recognized by the Secretary of the United States Department of the Interior, complains, alleges, avers, and prays this Court as follows:

---

[1] Throughout this Complaint, the Fort Apache Indian Reservation is referred to as the White Mountain-Fort Apache Indian Reservation. For geographic locations, there appears on the page that immediately follows a map entitled: "Salt and Verde River Watersheds Above Granite Reef Dam In Relation to Fort Apache Indian Reservation," hereafter referred to as Location Map.


KENT DECREE AREA
PHOENIX
GRANITE REEF DAM



LOCATION MAP

I.

JURISDICTION

The White Mountain Apache Tribe, which is being systematically deprived of its civil, human, and property rights by arbitrary, capricious, and illegal acts of Defendant Secretary of the Interior Watt and other named Defendants, all acting beyond the scope of their authority, invokes the jurisdiction of this Court pursuant to the Constitution of the United States of America and the Laws enacted in furtherance of that Constitution.

II.

The White Mountain Apache Tribe is cognizant that the states, and officials of the states, frequently acting, as here, in concert with Federal officials, are the historic and mortal enemies of the Indian Nations, Tribes, and people. Those who formulated the Constitution were well aware of the enemity of the states against Indian Tribes and provided in the Constitution that:

> The Congress shall have power . . . to regulate Commerce . . . with the Indian Tribes; . . .[2]

and thus provided the Tribes with protection against the states.

III.

Additionally, the Constitution constricts violation of Indian property rights by the states and officials of the states by the Supremacy Clause, which is as follows:

> This Constitution, and Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the

---

[2] Constitution of the United States, Article I, Section 8, Clause 3. (Emphasis added).

> Authority of the United States, *shall be the supreme Law of the Land;* and *the Judges in every State shall be bound thereby,* any thing in the Constitution or Law of any State to the Contrary notwithstanding.[3]

IV.

To safeguard against catastrophic attacks of the character giving rise to this litigation by Defendant Secretary Watt and other named officials and their staffs, through illegal, arbitrary, capricious conduct beyond the scope of their authority, the objectives of which are systematic extermination of the White Mountain Apache Tribe and its membership, the Constitution of the United States of America was amended to contain the following proviso:

> No person shall . . . be deprived of life, liberty or property, *without due process of law;* nor shall private property be taken for public use, without just compensation.[4]

V.

This Nation's Obligation As Trustee For Plaintiff White Mountain Apache Tribe

Pursuant to the Constitution of the United States of America and laws enacted pursuant to that Constitution, the National Government is Trustee for Plaintiff White Mountain Apache Tribe. Congress, in furtherance of the trust obligation, has conferred upon Defendant Secretary Watt the power, authority, and responsibility of the principal agent of the Trustee United States for the Plaintiff White Mountain Apache Tribe. That trust obligation requires Defendant Secretary Watt and that official's subordinates to perform the functions of Trustee solely for the benefit of the White Mountain Apache

---

[3] Constitution of the United States, Article VI.

[4] Constitution of the United States, Amendment [V.], Rights of Persons. (Emphasis added).

Tribe, establishing the most exacting fiduciary standards pursuant to which Defendant Secretary Watt and subordinates of that official must exercise that responsibility with the highest degree of care, skill, and diligence.

VI.

Congress, in the exercise of its Constitutional powers and in furtherance of the obligations of the United States of America Trustee, conferred upon this Court the following jurisdiction:

> *Indian tribes.* The district courts shall have orginal jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.[5]

VII.

BACKGROUND

The Apache War

The White Mountain Apache Tribe successfully waged war against Spain, Mexico, and the United States of America. In the Apache War, waged against it by the United States, the White Mountain Apache Tribe demonstrated with great courage and fortitude its commitment to preserving and defending its ancestral tribal home of which the White Mountain-Fort Apache Indian Reservation is but a fragment of its former vast domain.

VIII.

At great cost in money and lives in its brutal war against the Apaches, the United States of America undertook to exterminate and annihilate the Plaintiff White Mountain

---

[5] 28 U.S.C. 1362.

Apache Tribe. When it became manifest that the extermination and annihilation of the White Mountain Apache Tribe could not be accomplished within reasonable fiscal constraints, the United States of America adopted an Apache Peace Policy in lieu of the Apache War of extermination.[6]

IX.

Cognizance of the failure to annihilate the White Mountain Apache Tribe, Congress concurred in the peace Policy of the then administration. It implemented that policy by legislation.[7]

X.

THE BINDING COVENANT BETWEEN THE WHITE MOUNTAIN APACHE TRIBE, PLAINTIFF, AND THE UNITED STATES OF AMERICA

Peace with the Apaches was desired by Congress. It, however, demanded more. It declared that the corruption which was endemic in the Department of the Interior must be eliminated. Additionally, Congress provided that the President of the United States "*** organize a board of commissioners***" who, under Presidential direction, would "exercise joint

---

[6] The Apache Peace Policy was not the first time that the National Govenment sought peacefully to resolve the War with Apache Tribes. In the "Treaty With The Apache, 1852," shortly after the conclusion of the Mexican War, authorized agents of the United States of America met with " . . . chiefs, acting on the part of the Apache Nation of Indians, situated and living within the limits of the United States." Among other things, the Treaty with the Apache provides: "Article 9. Relying confidently upon the justice and liberality of the aforesaid government [of the United States], and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apaches' that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed condusive to the prosperity and happiness of said Indians. Treaty With Apache, 1852." July 1, 1852; 10 Stat. 979, ratified March 23, 1853; proclaimed March 25, 1853, Kappler, *Indian treaties, 1778-1883*, p. 598.

[7] Act of April 10, 1869, Chapter 16 (40 Stat. 13, 40).

control with the Secretary of the Interior over the disbursement" [8] of funds provided by the Congress. Additionally, the Congress directed the President to bring about peace with the Indians,

> "*** and bring them, where practicable, upon reservations, relieve their necessities, and encourage their efforts at self-support;***" [9]

XI.

As directed by Congress, President Grant created the Board of Indian Commissioners. The President moreover, designated Vincent Colyer Secretary of that Board. Broad powers were vested in Vincent Colyer to negotiate peace with the Apaches, to create reservations for them, and to "relieve their necessities."

XII.

In the spring of 1871, the proliferation of the Apache War was greatly feared. Vincent Colyer was directed specifically to go to Arizona and to cooperate with the United States Army in an attempt to ward off further hostilities.

XIII.

In the exercise of the Congressional and Presidential powers conferred upon him, Vincent Colyer, representing the United States of America, on September 2-7, 1871, met with the Chiefs of the White Mountain Apache Tribe at Camp Apache, later designated Fort . . . that great Secretarial wrong and the consequences emanating from it are continuing in nature and this proceeding seeks corrective action.

---

[8] *Ibid.*

[9] *Ibid.*

XXXVII.

For many years the Secretary of the Interior *failed:* (1) to prevent trespass by tens of thousands of non-Indian livestock upon the reservation; (2) to collect throughout many years either fees or penalties as provided by statute, for illegal grazing by non-Indians; and (3) to collect and to account for charges for grazing after 1900, all of which points to the culpability of Secretarial mismanagement. In the above-mentioned Docket 22-H, the Plaintiff Tribe is seeking, in the Court of Claims, to be reimbursed for that fiscal mismanagement. Here, however, the Plaintiff Tribe seeks to arrest further irreparable damage to its Reservation by Secretarial mismanagement and to undertake, pursuant to Court order, a rectification of past and on-going wrongs.

XXXVIII.

Catastrophic Erosion, Due To Secretarial Mismanagement, Is Endemic Throughout The Reservation

As a continuing wrong, Plaintiff White Mountain Apache Tribe is prepared to prove that, unless the erosion of the top soil on the Reservation stemming from Secretarial mismanagement is stopped, the Reservation will literally be washed away.

XXXIX.

The trespasses date back to 1871, stemming from Secretarial mismanagement giving rise to the over-grazing and the attendant destruction of the natural vegetative cover. As a result of that destruction, there has been virtually a total replacement of the natural grasses with an infestation throughout the Reservation of noxious weeds and inedible and unpalatable growth. The destruction of nutritious grass in itself has resulted in a sharp reduction in the carrying capacity of the land, thereby gravely limiting the number of head of cattle that can be maintained on the Reservation.

XL.

Secretarial mismanagement of the grazing lands likewise resulted in severe soil erosion. Throughout the entire Reservation sheet erosion has sharply reduced the top soil. Other large areas are virtually destroyed by gully erosion. There has been a total lack of competent corrective action on the part of Defendant Secretary Watt and that official's subordinates to stop the erosion.

XLI.

Destruction of the very good grazing land, within the Plaintiff Tribe's Reservation was no happenstance. By 1895 in the vicinity of Phoenix, as disclosed on the Location Map following page 1, downstream from the White Mountain-Fort Apache Indian Reservation on the Salt River, irrigation from the Salt River by non-Indian water users had taken the entire natural flow of the stream. Mismanagement of the grazing lands vastly increased the quantity of water leaving the Reservation for the benefit of non-Indians in the vicinity of Phoenix.

XLII.

This Court will take judicial cognizance of the fact that the destruction of the vegetative cover on grazing lands is a natural phenomenon which, as here, increased the quantity of water leaving the Reservation for the benefit of the downstream non-Indian water users. To buttress the judicial notice, that the destruction of the grazing lands by mismanagement caused the obliteration of the very good grazing lands on the Reservation, the Plaintiff Tribe will conclusively prove, with an abundance of unchallengeable evidence, that Defendant Secretary Watt and his predecessors and subordinates have been and are now mismanaging the entire Salt River drainage within the Reservation—to the irreparable and continuing damage of the Plaintiff Tribe—for the benefit of the Salt River Federal Reclamation Project, administered by the Salt River Valley Water Users' Association pursuant to contract with Defendant Watt.

XLIII.

Secretarial Forest Mismanagement

General Crook had appraised the grazing lands within the White Mountain Apache Indian Reservation as being "very good" in 1884. No reference was made to the vast and excellent forest lands, commercial in character, within that Reservation. Those forests, which commence immediately below "the South Edge of the Black Mesa," Northern Boundary of the Reservation, encompass approximately 500,000 acres of the White Mountain Apache Indian Reservation.

XLIV.

Total Secretarial mismanagement—to the exclusion of the Plaintiff Tribe—of those excellent forest lands was not greatly different from the Secretarial mismanagement of the grazing lands. Trespassing non-Indian cattle in the tens of thousands destroyed the grazing within the forest lands.

XLV.

Failure to harvest mature trees and properly to otherwise manage the forests and protect them against fire destruction is part of the continuing wrong stemming from Secretarial mismanagement. Monetary recovery for forest mismanagement is totally inadequate. The damage claims made by the Tribe in Docket 22-H in the Court of Claims cannot do justice to the Tribe. To prevent the planned, ongoing destruction of the forests by Defendant Secretary Watt to enhance Salt River runoff from the White Mountain-Fort Apache Indian Reservation requires both declaratory and injunctive relief in this Court against Secretary Watt and the other named Defendants.

XLVI.

SECRETARIAL MISMANAGEMENT OF THE SALT RIVER DRAINAGE WITHIN THE WHITE MOUNTAIN-FORT APACHE INDIAN RESERVATION FOR THE BENEFIT OF RECLAMATION PROJECTS MUST BE ENJOINED AND RESTRAINED

Conflicts Of Interest Pervade Secretarial Maladministration

The Secretary of the Interior on March 14, 1903, authorized the construction of the Salt River Federal Reclamation Project. Reference is made to the Location Map which follows page 1 of this Complaint. There, it will be observed, the principal components of the Salt River Federal Reclamation Project are set forth. The Roosevelt Dam, a major structure on the Salt River, and the Reservoir created by it impound the waters from that stream for the benefit of the Salt River Federal Reclamation Project.

XLVII.

The Secretary of the Interior, acting in concert with the Salt River Valley Water Users' Association, which manages the Salt River Federal Reclamation Project by contract for Defendant Secretary Watt, claims *all* of the Salt River waters which arise upon, border, traverse, and underlie the White Mountain Apache Indian Reservation. Those rights are aggressively asserted by Defendant Secretary Watt and the Salt River Valley Water Users' Association against the Plaintiff Tribe.

XLVIII.

From the inceptive moment of the Salt River Federal Reclamation Project, the successive Secretaries of the Interior, including Defendant Secretary Watt, have violated the Indian reserved rights to the use of water within the Salt River Drainage for the benefit of that Project. As early as 1913 the Salt River Federal Reclamation Project was involved in a

scandal respecting Indian water rights which was investigated by Congress.[21] In its Report, Congress castigated the Secretary of Interior and the Bureau of Reclamation in these terms:

> The Indian interests have been most outrageously intermingled with the affairs of the Reclamation Service; consequently, the appropriations and uses of the waters of the Salt and Gila Rivers form the basis of the investigation.
>
> * * * *
>
> The business transactions of the Reclamation Service generally in Arizona have been conducted in the twilight zone. If actual fraud does not exist, it can at least be said that many of the badges of fraud are evident in these transactions.[22]

Defendant Secretary Watt has continued the tradition of the Bureau of Reclamation in "outrageously" violating Indian rights to the use of water.

LXIX.

Seizure Of White Mountain Apache Forest Lands By The Secretary Of The Interior For The Benefit Of The Salt River Federal Reclamation Project

When the Covenant was entered into between the United States of America, acting by and through Vincent Colyer, creating the White Mountain Apache Indian Reservation, there were included within that Reservation approximately 500,000 acres of invaluable forest lands. Those forest lands within the Reservation were situated immediately below "the South Edge of the Black Mesa."

---

[21] Report in the Matter of the Investigation of the Salt and Gila Rivers—Reservations and Reclamation Service, 62nd Congress, 3rd Session, Report No. 1506, House Calendar No. 190, House of Representatives, February 11, 1913, p. 3.

[22] *Ibid.*, at 17.

L.

The forest lands of Plaintiff Tribe encompassed the headwaters of the Salt River and many tributaries of that stream. To secure total control of the Salt River and its tributaries within the White Mountain-Fort Apache Indian Reservation, the then Secretary of the Interior requested President Theodore Roosevelt to expropriate, by a series of Executive Orders, the Plaintiff Tribe's forests and include them in the Black Mesa National Forest, the southern boundary of which was "the South Edge of the Black Mesa," which is, of course, the Northern Boundary of the White Mountain-Fort Apache Indian Reservation. President Roosevelt complied with the request of the Secretary of the Interior and the Plaintiff Tribe's forest lands were purportedly taken from it.[23]

LI.

An incredible aspect of the transfer of the invaluable forest lands of the White Mountain Apache Tribe to the National Forests, all as recommended by the Secretary of the Interior, is the pronouncement contained in the Proclamations that it would promote "the public good." [24]

LII.

The seizures of the forest lands of Plaintiff Tribe, as averred above, were declared to be illegal. Those lands were subsequently restored to the White Mountain-Fort Apache Indian Reservation, with this Presidential declaration:

> The purpose of this exclusion [from the National Forests] is to restore the White Mountain Apache

---

[23] The lands of the White Mountain Apache Indian Reservation were transferred to that portion of the Sitgreaves National Forest which had previously been part of the Black Mesa National Forest. III Kappler, pp. 636, *et seq.*, Proclamation dated March 2, 1909. A portion of the lands taken from the White Mountain Apache Indian Reservation were included in the Apache National Forest, III Kapper, pp. 649-651.

[24] *Ibid.*

> Indian Reservation in all respects to the status existing prior to the said proclamation of March 2, 1909, as though the inclusion of the lands within the . . . [National forests] had not been ordered, and said Indian reservation is hereby fully re-created and restored to that status.[25]

LIII.

Defendant Secretary of Agriculture Block Trespasses On Reservation Below "the South Edge of the Black Mesa"

Irrespective of the restoration of those invaluable forest lands to Plaintiff Tribe, there remains today within the boundaries of the Sitgreaves National Forest and the Apache National Forest approximately 14,000 acres of forest lands which are part of the White Mountain-Fort Apache Indian Reservation.

LIV.

Defendant Secretary Block, acting through the Forest Service, continues to occupy those 14,000 acres of land, title to which resides in Plaintiff Tribe. Defendant Block continues to sell from those lands the timber which is harvested and retains the proceeds from those sales without accounting for them to Plaintiff Tribe. He further permits livestock to graze on those lands, for a fee, which also is not accounted for to the Tribe.

LX.

Systematic Suppression Of Irrigation Development On The Reservation By The Department Of The Interior

As reviewed above, the Secretary of the Interior has constructed the Salt River Federal Reclamation Project. As

---

[25] III Kappler, *Laws and Treaties*, p. 671; Executive Orders dated February 17, 1912, Nos. 1475, 1477, and 1479. That action was taken pursuant to 29 Opinion Attorney General 239, 241 (1911) respecting the White Mountain Apache-Fort Apache Indian Reservation in which the Attorney General declared: "The necessary effect of this legislative recognition was to confirm the Executive order, and establish beyond challenge the Indian title to this [White Mountain-Fort Apache] reservation. (*In re Wilson*, 140 U.S. 575, 577.)"

part of the departmental policy, successive Secretaries of the Interior, including Defendant Secretary Watt, have suppressed irrigation and other water development on the White Mountain-Fort Apache Indian Reservation for the benefit of the Salt River Federal Reclamation Project. This excerpt from the Bureau of Indian Affairs' 1944 Report discloses the character of that suppressive policy regarding the White Mountain-Fort Apache Reservation:

> All of the Reservation from its highest elevation to its lowest has been filed on by the Salt River Water Users Association and the consumption of every drop of water on this reservation is watched by this association because of the need for the same in the Salt River Valley. The entire reservation is the watershed for the Roosevelt Dam and the Water Users Association. **** Any large expansion of the irrigation within the reservation, except the improvement of those many small projects established by the military long before the construction of the Roosevelt Dam and its subsidiary dams, is blocked by the Salt River Valley Water Users Association. Therefore, irrigation within the reservation constitutes merely the improved irrigation facilities for the better utilization of the unquestioned water rights.[28]

LXI.

Failure of the Bureau of Indian Affairs to preserve and protect the invaluable reserved water rights of Plaintiff Tribe is evidenced by another report by that agency from which this excerpt is taken:

> There have been no filings made on behalf of the [White Mountain Apache] Indians for irrigation water in the reservation. The rights of the Indians to

---

[28] Postwar Program, White Mountain Apache Tribe, Fort Apache Indian Reservation, Whiteriver, Arizona, June 1, 1944, pp. 14 *et seq.*, Bureau of Indian Affairs, Department of the Interior.

use water is based on prior beneficial use, which dates back to before the establishment of the reservation in 1870.[29]

Reflective of the total disregard of the Indian rights is the fact that the Bureau of Indian Affairs (1) ignored the principle that a filing with the State of Arizona was totally unnecessary, the State having absolutely no jurisdiction within the Reservation over the Tribe's reserved rights and (2) that there resides in the Plaintiff Tribe reserved rights to the use of water adequate to meet its present and future water requirements wholly independent of state law.[30]

LXII.

At all times the Bureau of Indian Affairs, under the direction of the Secretaries of the Interior, including Defendant Secretary Watt, has supported those officials' claim that *all* of the waters on the White Mountain-Fort Apache Indian Reservation are committed to the Salt River Federal Reclamation Project.

LXIII.

As a matter of policy, the Bureau of Indian Affairs, acting on behalf of the Secretary of the Interior, has adamantly refused to construct projects on the Reservation which would irrigate lands beyond the minimal acreage served by small ditches constructed by the Plaintiff Tribe itself, sometimes with the assistance of the military when, in the early 1870s, the U.S. Army occupied the Reservation.

LXIV.

Subsequent to World War II, the Department of the Interior, acting through the Bureau of Indian Affairs and the

---

[29] Bureau of Indian Affairs Report, Department of the Interior, 1943 p. 5. See *infra*, p.

[30] See, *infra*, p. 43, *et seq.*; p. 47, *et seq.*

Bureau of Reclamation, frequently in open concert with the Salt River Valley Water Users' Association, espoused programs within the White Mountain-Fort Apache Indian Reservation to modify existing vegetative growth for the purpose of increasing runoff from the Plaintiff Tribe's Reservation for the benefit of the Salt River Federal Reclamation Project.

LXV.

The Bureau of Indian Affairs, in keeping with the above quoted excerpts,[31] limited all expenditures of funds to maintaining existing small irrigation diversions, and did not permit any increase in irrigated acreage within the Reservation. When a major project was undertaken to irrigate lands in what is now referred to as the White Mountain Apache Canyon Day Project, the development was stopped to assure that there would be no interference with the delivery of water from the Reservation to the Salt River Federal Reclamation Project. Commencing in 1980 the Plaintiff Tribe undertook the construction of its own Canyon Day Project, substantially funded from its own resources, and is now irrigating approximately 900 acres.

LXVI.

It was the policy of the Bureau of Indian Affairs to constrict all water resource development within the White Mountain-Fort Apache Indian Reservation with the exception that water resource development would be permitted to the extent that water which would not normally reach the Salt River Federal Reclamation Project could be "salvaged." Extensive programs to destroy water consuming plants, and thereby "salvage" water for use on the Reservation was undertaken with minimal success.

---

[31] *Supra.*, pp. 30-31.

LXVII.

In 1954 in what is referred to as the "Battle of Hawley Lake," the Salt River Valley Water Users' Association vigorously undertook to prevent Plaintiff Tribe from creating a lake for fishing and other recreational purposes. The Salt River Valley Water Users' Association sought unsuccessfully to extend the *Kent Decree* to include Plaintiff Tribe and its Reservation. By steadfast action, the Tribe defeated the Association in its efforts to extend the *Kent Decree* to its water resource development on the Reservation.[32]

LXVIII.

Induced Aridity—Secretarial Scorched Earth Policy

A primary factor contributing to the accelerated runoff of the Salt River and its tributaries within Plaintiff Tribe's Reservation and the degradation of the beds of the streams, as pleaded above, has been the over-grazing extensively reviewed. The over-grazing resulted in, among other things, livestock trampling the top soil, compacting it and thereby preventing the top soil from absorbing the natural precipitation. As a result, the water, which would normally be absorbed, enters the streams and flows away from the Tribe's grazing lands. In the state of nature, that water which runs off would normally provide the moisture necessary for plant growth which originally created the very good grazing referred to above.

LXIX.

The Bureau of Indian Affairs, acting closely with the Bureau of Reclamation and the Salt River Valley Water Users' Association, vigorously prosecuted a program to eliminate trees along the streams within the Reservation. In that manner, the trees and brush naturally growing on the banks of the streams were systematically poisoned or otherwise eliminated, thus increasing the flow of the Salt River away from the Reservation to the Federal Reclamation Project.

---

[32] *Infra.*, p. 40.

LXX.

By the destruction of the natural growth along the streams, the Bureau of Indian Affairs accelerated the degradation of the beds of the streams—Cibeque Creek, Carrizo Creek, and all other streams within the Reservation. Great and continuing irreparable damage has been and is being experienced by Plaintiff Tribe due to that destructive program by the Bureau of Indian Affairs which accelerates erosion and greatly depletes the water naturally available to the Reservation.

LXXI.

This vastly accelerated stream flow resulted in excavating and cutting the streams to bedrock and lowering the level of the stream beds so drastically that ditches, which for years had supplied the Indians with water for irrigation, were rendered useless.

LXXII.

Additionally, the Bureau of Indian Affairs' policy of destroying vegetation along the streams, thus accelerating the flow of the streams, and lowering of the stream bed, has resulted in the draining of groundwater which naturally supported an abundance of forage. Destruction of that forage sharply reduced the feed available for the Tribe's livestock.

LXXIII.

The induced aridity by the Bureau of Indian Affairs of the lands within the White Mountain-Fort Apache Indian Reservation has defeated efforts of the Plaintiff Tribe to restore the carrying capacity of the once very good grazing land. Only by corrective measures will it be possible for the Plaintiff Tribe to maintain within the Reservation a viable livestock industry. That can be accomplished with the attendant great benefit to the Tribe if Defendant Secretary Watt would change the policy

from utilizing techniques to increase runoff away from the Reservation, for the benefit of the Salt River Federal Reclamation Project, and instead retain that water on the Reservation greatly to increase the production of grass and other livestock feed.

LXXIV.

Destruction of plant growth within Plaintiff's Reservation to reduce water use by the Tribe and to enhance runoff for the Salt River Federal Reclamation Project has not been limited to the grazing lands. A program has been conducted by the Bureau of Indian Affairs to clear-cut forest trees along the streams within Plaintiff Tribe's forest lands and thereby induce greater stream flow for the down-stream federal projects. Identically the same results have occurred within the forest lands of the Plaintiff Tribe as has occurred on the grazing lands. There has been accelerated runoff within the Tribe's forests, a degrading of the beds of the streams, induced erosion, the drainage of groundwater, and an increased flow of water away from the Tribe's forests.

LXXV.

Induced aridity within Plaintiff Tribe's forests has limited both the forage and the tree growth. Additionally, the failure of the Bureau of Indian Affairs to take steps to prevent erosion within the forests has vastly increased the sedimentation in the streams and the loss of soil fertility, all of which contributes to the loss of productivity of the Tribe's highly valuable timber growth.

LXXVI.

The accelerated runoff away from the forests has further resulted in gully erosion, the destruction of trees, and increased aridity throughout the areas subjected to the erosion.

LXXVII.

Prescribed or intentional burning sponsored by the Bureau of Indian Affairs in Plaintiff Tribe's forests has in practice been destructive for the following reasons: (1) trees which would otherwise have grown to maturity have been destroyed while the growth of other trees has been sharply retarded; and (2) due to the intensity of the fires, within the Plaintiff Tribe's forests, the top soil has been baked to the point that it is water resistant and natural precipitation, which normally would enter the soil and increase plant and tree growth, runs off into the streams benefiting the Salt River Federal Reclamation Project.

LXXVIII.

Mismanagement Of Forest Operations To Increase Runoff

Acting on behalf of the Secretary of the Interior, the Bureau of Indian Affairs has solicited intensive studies to determine the best means of cutting timber in Plaintiff Tribe's forests to enhance runoff for the Salt River Federal Reclamation Project. At one time it was urged by consultants of the Bureau of Indian Affairs that clear-cutting was the best method to increase runoff for the down-stream non-Indian water users. Strenuous objections were interposed by Plaintiff Tribe and that scheme did not come immediately to fruition.

LXXIX.

Additionally, the Bureau of Indian Affairs greatly increased the harvest of immature and small trees which has reduced the number of trees growing to maturity thereby reducing the quantity of water consumed and the timber produced. Cutting immature trees and leaving matured trees that have achieved their full growth resulted in a reduction of the quantity of water utilized, since mature trees, having attained their full growth, require less water than younger trees which are growing. As a consequence, the stream flow was enhanced and the timber production markedly reduced by the course of action described.

LXXX.

Continuing to sponsor the program to clear-cut the Tribe's timber for the purpose of increasing runoff, the Bureau of Indian Affairs, rather than take action to destroy a beetle infestation which has been in the Plaintiff Tribe's spruce forest since the 1940s, proposes clear-cutting the 69,000 acres of that spruce forest. In that manner, the Bureau of Indian Affairs, acting for Defendant Secretary Watt, would destroy the forest and would vastly increase the runoff from the most water productive area on the Reservation, all to the benefit of the Salt River Federal Reclamation Project and the now abuilding Central Arizona Federal Reclamation Project, which Defendant Secretary Watt will shortly complete.

LXXXI.

In the early 1940s, there were methods which were known at that time which could have arrested the beetle infestation. It is shocking that successive Secretaries of the Interior, including Defendant Secretary Watt, and the Bureau of Indian Affairs refused then and continue to refuse to take any corrective action to stop that infestation, despite the repeated demands of Plaintiff Tribe and the availability of improved techniques which can be used.

LXXXII.

Defendant Secretary Watt's Central Arizona Federal Reclamation Project Is A National Scandal

The Central Arizona Federal Reclamation Project is a national scandal of incalculable magnitude. It is subsidized by billions of dollars now being spent by Defendant Secretary Watt to complete that project at the earliest possible date. In theory, that vast public works program was to derive a supply of water from the Colorado River, to be pumped in excess of 300 miles to Phoenix and Tucson. Undenied and undeniable is the fact that the Colorado River is several times over-

appointed. Hydrologic studies conducted by the Plantiff Tribe reveal the magnitude of the deficiency of water from the Colorado River.

LXXXIII.

Failure of the Colorado River as an adequate supply of water for the Central Arizona Project has not deterred Defendant Secretary Watt in driving for its completion. Lavishly pouring Federal funds into the completion of that Project partakes of the irresponsible. That Project is both physically infeasible—it does not have a supply of water—and economically infeasible—it cannot pay out, requiring the Federal taxpayers to subsidize the Project by the expenditure of huge, nonreimbursable funds.

LXXXIV.

To cover the fraud of the Central Arizona Federal Reclamation Project and to avoid momentarily—not for long—the public exposure of the monstrous shortfall in the supply of water for the Project, Defendant Watt has decided to sacrifice the Central Arizona Tribes, by seizing their Salt and Gila River rights, irrespective of the fact that the Tribes were irrigating the very area here involved since time immemorial.

LXXXV.

Defendant Secretary Watt; that official's subordinates in the Bureau of Reclamation; the Bureau of Indian Affairs; the Solicitor's Office; the Department of Interior, acting in concert with the Department of Justice, under the direction of Defendant William French Smith, have developed concepts and methods pursuant to which the reserved rights of the Central Arizona Tribes will be sacrificed behind a legal facade for the benefit of the Central Arizona Project.

LXXXVI.

It has been proposed by the above-named officials that the Indians would enter into negotiations involving the Salt River Valley Water Users' Association and other state entities pursuant to which the Indian rights would allegedly be settled. Failing thus to negotiate away the Indian reserved rights, those two departments would force the Tribes into litigation, with the Department of Justice representing both the Indian Tribes and Defendant Secretary Watt and subordinates of that official. The proposals thus espoused by Defendant Secretary Watt and Defendant William French Smith involve irreconcilable conflicts of interest, which, in the words of the Court of Appeals, render inadequate Tribes' representation by the Department of Justice.

LXXXVII.

Sewage Exchange To The Indians By Defendant Secretary Watt For The Indian Reserved Rights [33]

Appendix D of this Complaint is Defendant Watt's plan to enhance a drastically short supply of water from the Colorado River by supplementing that short supply through exchange of sewage effluent for Salt and Gila River water to which the Central Arizona Tribes are legally entitled.

LXXXVIII.

Though equivocally stated by Defendant Secretary Watt in Appendix D, the Central Arizona Indian Tribes will be forced to accept the Secretarial seizures of their Salt and Gila River rights which have already transpired. Those Tribes will not only be forced to accept the loss of their vested rights, but, moreover, the prospectus of funding for costly delivery systems of the sewage effluent, in all probability, will never be provided; and finally, the already drastically short supply of Salt and Gila

---

[33] See Appendix D, Central Arizona Project, Water Allocation 48 Fed. Reg. No. 58, March 24, 1983.

River water, to which the Indians are entitled, will be utilized to augment the Colorado River water deficiencies, to which reference has been made.

LXXXIX.

Defendant Secretary Watt's seizure of Plaintiff Tribe's Salt River rights, which will exterminate Plaintiff Tribe, will, nevertheless, fall far short of providing the Central Arizona Federal Reclamation Project with an adequate water supply. Ultimately, Arizona must obtain water from an additional source, whereas, the sole source of water for Plaintiff Tribe is the Salt River. As distinguished from Plaintiff Tribe, Arizona has alternative remedies. Justice and equity demand that Defendant Secretary Watt and his subordinates be prevented from accomplishing the destruction of the Tribe, which will ensue if Defendant Watt's planned seizure of Plaintiff Tribe's rights is effectuated.

XC.

Measure Of Plaintiff Tribe's Reserved Rights To The Use of Water And Induced Reduction Of Plaintiff Tribe's Water Supply

When Defendant Secretary Watt undertook the responsibilities of the principal agent of the Trustee United States for the Plaintiff White Mountain Apache Tribe, that official renewed efforts to force Plaintiff Tribe to negotiate away its Salt River rights or to accept the representation of the Department of Justice in state court litigation, which will be subsequently described in detail. Additionally, Defendant Secretary Watt, acting through subordinates, declared that Plaintiff White Mountain Apache Tribe should submit to additional soil and land classification studies purportedly to determine the irrigable acreage within the White Mountain-Fort Apache Indian Reservation. By drastically reducing the irrigable acreage within Plaintiff Tribe's Reservation, there would be a commensurate drastic reduction in the extent of the Tribe's reserved rights to the use of water in the Salt River and its tributaries. Part of

Plaintiff Tribe's proof in these proceedings will be the patterns adhered to by Defendant Secretary Watt both to reduce the irrigable acreage (with the attendant reduction of the Tribe's reserved rights) and to increase the flow of water away from the Reservation for the benefit of the non-Indian users and federal reclamation projects.[34]

XCI.

The present attack upon Plaintiff Tribe's irrigable acreage by Defendant Secretary Watt is but part of a long-term effort by the Department of Interior to take from Plaintiff White Mountain Apache Tribe its life-sustaining reserved rights to the use of water. In the early and middle 1950s, in contemplation of the case of *Arizona* v. *California*, the Department of the Interior undertook studies to determine the irrigable acreage within the Tribe's Reservation. Those who made the soil surveys in the 1950s were directed *to limit the irrigable acreage* within the White Mountain-Fort Apache Indian Reservation to those lands which could be irrigated by the *ditches first established by Plaintiff Tribe and the United States Army in the early 1870s.* That long-time policy is stated above in detail.[35]

---

[34] Indian Reserved Rights Doctrine—measure of those rights: In *Arizona* v. *California*, 373 U.S. 546, 598-601 (1963), the Supreme Court reaffirmed the 1908 Winters Doctrine, enunciated by the Supreme Court in *Winters* v. *United States*, 207 U.S. 564, 576 (1908). In that decision, the Supreme Court declared that when Indians entered upon their reservation, they retained—did not convey to the United States—rights to the use of water adequate to meet their present and future water requirements. This is the language, which establishes, on behalf of the Plaintiff White Mountain Apache Tribe, the law of this case, which is quoted from *Arizona* v. *California:* "It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe * * * when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the [Colorado] River would be essential to the life of the Indian people * * * and the crops they raised. pp. 598-599).

***

We have concluded * * * that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. (p. 601).

[35] *Supra.*, p. 30.

XCII.

In the 1960s, the Department of Interior, acting through the Solicitor's Office, the Department of Justice, and the Bureau of Indian Affairs vigorously sponsored a limiting arrangement, known as the Salt River Agreement, between the Plaintiff Tribe, the Salt River Valley Water User's Association, and other Tribes. By that Agreement, ultimately rejected by Plaintiff Tribe, the Department of Interior, acting in close concert with the Salt River Valley Water Users' Association, sought to limit the Tribe's rights to 36,000 acre feet annually. As set forth below, that quantity of water is but a small fraction of the Tribe's legal entitlement based on irrigable acreage within its Reservation.[36]

XCIII.

As the construction of the Central Arizona Federal Reclamation Project proceeded and the scandalous water deficit became better known, the Bureau of Indian Affairs became more aggressive in its effort to reduce Plaintiff Tribe's reserved rights. Successive studies were undertaken by that Agency, all of which sharply reduced the Tribe's rights to the use of water. This is in keeping with the broad policy referred to above pursuant to which Indian rights have been seized for the benefit of the Salt River Federal Reclamation Project.[37]

XCIV.

Thus confronted, Plaintiff Tribe initiated, in the year 1979, intensive studies as to both its water requirements and the availability of Salt River water to meet those requirements. Those studies reveal that:

(a) there are within Plaintiff Tribe's Reservation 49,859.09 irrigable acres with a water requirement annually of 5.38 acre feet for each acre;

---

[36] *Infra.*, para. XCIV.

[37] *Supra.*, pp. 23-24.

(b) The Tribe's water requirements for the full irrigable acreage is 268,169 acre feet annually for the purposes of irrigation;

(c) Plaintiff Tribe will require annually approximately 250,000 acre feet of water for municipal, livestock, industrial, recreation, hydropower, mineral, and other beneficial uses;

(d) the Tribe is prepared to prove that Defendant Secretary Watt and the officials acting in concert with him artificially induced 100,000 acre feet of water annually to flow off and away from Plaintiff Tribe's Reservation, and thus deprive Plaintiff Tribe of a quantity of water sufficient to irrigate approximately 20,000 acres of land.

XCVI.

UTILIZATION OF FEDERAL AND STATE COURTS BY THE SECRETARY OF THE INTERIOR AND THE ATTORNEY GENERAL TO CONFISCATE INDIAN RESERVED RIGHTS

A Fraudulent Facade

There has been a systematic suppression of the exercise by the Central Arizona Tribes of their reserved rights to the use of water in the Salt and Gila River by fraud, sham, bad faith, and chicanery practiced upon them by successive Secretaries of the Interior acting in concert with the Attorney General, principal administrator of the Department of Justice. Defendants Secretary Watt and Attorney General Smith, principal agents of the United States Trustee, seek to seize and take from the Plaintiff Tribe its rights to the use of water in the Salt River and its tributaries, as the predecessors of those officials have accomplished in regard to other Central Arizona Tribes.

XCVII.

Fully aware of the fraud and sham that has been practiced upon other Indian Tribes, the Plaintiff Tribe has placed Defendants Secretary Watt and Attorney General Smith on notice

that they must refrain from purporting to force upon the Plaintiff Tribe their rejected, unwanted, and highly objectionable representation in litigation now pending in the Superior Court of Maricopa County, State of Arizona, or in any other court.

XCVIII.

Kent Decree—Used To Suppress Exercise Of Indian Reserved Rights

In 1906, the Court of Appeals for the Ninth Circuit, the jurisdiction of which embraced the then Arizona Territory, rendered its decision in *Winters v. United States.*[38] There the Court of Appeals for the Ninth Circuit declared that Indian Nations and Tribes hold reserved rights to the use of water in the streams that arise upon, border, traverse, or underlie their lands. Those reserved rights, declared the Court of Appeals for the Ninth Circuit, would be protected against both the United States and the states and their successors in interest.

XCIX.

In 1908, the Supreme Court affirmed the opinion of the Court of Appeals for the Ninth Circuit in *Winters v. United States.*[39] The *Winters Doctrine* has been previously reviewed, the concepts of which have been and are now applicable to the reserved rights of Plaintiff Tribe.

C.

In 1910, the Attorney General of the United States stipulated the entry of the *Kent Decree* in the case of *Hurley v. Abbott, United States Intervenor,* in the Superior Court of Maricopa County, Territory of Arizona. The then Secretary of the Interior and the Attorney General had full knowledge that

---

[38] 143 F. 740, 749 (CA 9, 1906).

[39] 207 U.S. 564, 576 (1908).

the Court of Appeals for the Ninth Circuit and the Supreme Court had announced and reaffirmed the *Winters Doctrine,* which assures Indian Nations and Tribes that they are entitled to an adequate supply of water to meet their present and future water requirements. Irrespective of the *Winters Doctrine,* those officials purportedly abandoned the reserved rights of the Tribes there involved, for the benefit of the Salt River Federal Reclamation Project, limiting those Tribes to the meager quantities of Salt River and Verde River waters that had been previously utilized by those Tribes.

CI.

By the *Kent Decree,* the Secretary of the Interior and the Attorney General have effectively carried out their plans to suppress the exercise of the reserved rights of the Tribes there involved for the benefit of the completed Salt River Federal Reclamation Project, concerning which the Plaintiff Tribe has pleaded above.[40] Additionally, Defendant Secretary Watt acquiesces in non-Indian use of Salt River water on lands not included in the *Kent Decree.* As a consequence, Indian Tribes have been deprived of water to which they are entitled, resulting in Indian poverty while surrounded by vast production of non-Indian crops, which are irrigated entirely through the use of Salt River water to which the Indians are entitled.

CII.

Gila River Decree—A Repetition Of The Fraud On Central Arizona Indians

The *Gila River Decree,* Globe Equity, No. 59, was entered in this Court on June 29, 1935. In that Decree, as distinguished from the *Kent Decree,* cognizance was taken by the then Attorney General and the then Secretary of the Interior of the reserved *Winters Doctrine* rights of the Indian Tribes there involved. Perhaps more shocking than the *Kent Decree,* those

---

[40] *Supra.,* pp. 22, *et seq.,* p. 46.

officials, having recognized the reserved rights doctrine, abandoned a large proportion of those Indian reserved rights for the benefit of non-Indian Gila River water users.

CIII.

To the extent that Indian reserved rights have been recognized in the *Gila Decree,* the Secretaries of the Interior have consistently and effectively prevented the exercise by the Indians of those reserved rights, all to the benefit of the non-Indian water users.

CIV.

Plaintiff White Mountain Apache Tribe Not Subject To Kent Or Gila Decrees

Neither the *Kent Decree* nor the *Gila Decree* has as yet been applied to the Plaintiff White Mountain Apache Tribe. Efforts by Defendants Secretary Watt and Attorney General Smith to bring the Tribe within the concepts of those documents are elements giving rise to this litigation. Confronting the Plaintiff Tribe in these proceedings is the adamant insistence by Defendant Secretary Watt and Defendant Attorney General Smith that they will force upon Plaintiff Tribe the unwanted, rejected, and highly objectionable representation by the Department of Justice in ongoing litigation to which reference will be made.

CV.

To prevent the use of soil studies and related data assembled by the Department of the Interior, in the ongoing W-1 proceedings in the Superior Court of Maricopa County by personnel of the Department of Justice, Plaintiff Tribe petitioned, on December 23, 1981, its Tribal Court for an injunction to restrain the release of that data for use in the W-1 proceedings. The Department of Justice thereafter initiated in this Court the case of *United States of America,* Plaintiff *v. White Mountain*

Apache Tribe, et al., Defendants, Civ. 81-1606-PCT-VAC. By that action, Defendant Attorney General Smith seeks to prevent Plaintiff Tribe from defending itself against the efforts of Defendant Secretary Watt and that official's subordinates from utilizing inadequate data pursuant to which the Tribe's reserved rights would be vastly denigrated.

CVI.

Fully aware of the disaster visited upon other Central Arizona Tribes by the Secretaries of the Interior and Attorney Generals, Plaintiff Tribe has undertaken intensive soil and land classification studies and has completed those studies. It is on the basis of those studies that there is set forth above the irrigable acreage within the White Mountain-Fort Apache Indian Reservation and the quantities of water to which Plaintiff Tribe is entitled, all as specifically averred.[41]

CVII.

In the case last mentioned, on March 8, 1982, this Court "*** ORDERED that all further proceedings in this action are stayed pending a final decision in *** [the *San Carlos Apache* and *Northern Cheyenne* cases] or until further order of this Court." Petitions for rehearing were filed in the Supreme Court of the United States in regard to the Supreme Court decision of July 1, 1983, in the case of *Arizona v. San Carlos Apache Tribe,* No. 81-2147 and *Northern Cheyenne v. Adsit,* No. 81-2188. Those petitions were recently denied.[42]

CVIII.

This Court, in its January 12, 1982 hearing, in *United States v. White Mountain Apache Tribe,* in response to bad-

[41] *Supra.,* pp. 45, *et seq.*

[42] See Slip Opinion, *Arizona v. San Carlos,* July 1, 1983.

faith charges made by Plaintiff Tribe against the Department of the Interior and the Department of Justice, said this:

> **** I think this Court or any court would be hard put to decide that the government should proceed in the state court to represent somebody or some Tribe when the facts show that they are doing so in bad faith ****
>
> I do not believe that any judge would proceed to rule on this matter having heard those statements [respecting bad faith of the Interior and Justice Department officals] without receiving the evidence.[43]

CIX.

There is pleaded above with specificity, and the Plaintiff Tribe is prepared to prove with exactitude, the ongoing bad faith of Defendant Secretary Watt and that official's subordinates in their intentional mismanagement of Plaintiff Tribe's reserved rights to the use of water, its grazing lands, its irrigable lands, and its forest lands. That mismanagement by Defendant Secretary Watt is the very essence of bad faith on the part of that official, Trustee for Plaintiff Tribe.

CX.

Proceedings In Superior Court In Maricopa County Partially To Adjudicate Salt River Rights To The Use Of Water

There has been pleaded above the character and nature of the 1910 *Kent Decree* which purported to adjudicate certain of the surface rights in the Salt River, all as set forth on the Location Map which follows page 1 of this Complaint. There was before this Court an action by the Salt River Valley Water Users Association to enlarge the *Kent Decree* to the end that the reserved rights of Plaintiff White Mountain Apache Tribe could be subjected to that Decree.

---

[43] Transcript of Proceedings, January 12, 1982, at p. 105, l. 10-24.

CXI.

In that proceeding, the Salt River Valley Water Users' Association sought to rely upon the limited waiver of the sovereign immunity of the United States of America as set forth in the McCarran Amendment, 43 U.S.C. 666.

CXII.

This Court, in dismissing the action to enlarge the *Kent Decree* to include Salt River rights above Granite Reef Dam, said this:

> There is authority to the effect that the United States may be joined in a properly initiated proceedings to determine the appropriative rights of an entire watershed, under 43 U.S.C., § 666. For petitioner Association to rely on this authority, however, all landowners in the watershed, or who appropriate from it, must be or have been joined, and prayer must be made for an adjudication of each of their respective rights.[44]

CXIII.

The White Mountain Apache Tribe, Plaintiff, asserts here that this Court's decision quoted above is the law of this case and that Plaintiff Tribe is immune from suit respecting its Salt River reserved rights, there having been no waiver of that immunity.

CXIV.

Subsequent to this Court's denial that the attempt to enlarge the *Kent Decree* was within the purview of the McCarran Amendment, 43 U.S.C. 666, the Salt River Valley Water Users' Association initiated a proceeding on April 26,

---

[44] *Hurley* v. *Abbott*, 259 F.Supp. 669, 670, U.S.D.C., D. Arizona (1966).

1974, in the "State Land Department of the State of Arizona," which proceeding was designated "IN THE MATTER OF THE DETERMINATION OF CONFLICTING RIGHTS TO THE USE OF WATER FROM THE SALT RIVER ABOVE GRANITE REEF DAM AND ITS TRIBUTARIES INCLUDING TONTO CREEK, EXCLUDING THE VERDE RIVER AND ITS TRIBUTARIES." After the initiation of those proceedings, Arizona's laws were amended conferring jurisdiction in that proceeding upon the Superior Court of Maricopa County. Thereafter the proceedings were referred to as W-1. Having been served, the White Mountain Apache Tribe filed its petition to remove the proceedings from the Superior Court to this Court and moved to dismiss. This Court denied the motion to dismiss, remanding the matter to the Maricopa County Court.[45]

CXV.

San Carlos and Northern Cheyenne Decisions [46]

In reversing this Court in the *San Carlos* and *Northern Cheyenne* cases, the Court of Appeals for the Ninth Circuit declared that the McCarran Amendment, 43 U.S.C. 666, was inapplicable in the states such as Arizona and Montana in which the Enabling Acts and Constitutions disclaim jurisdiction over Indian lands. Additionally, the Court of Appeals for the Ninth Circuit reiterated and reaffirmed its earlier decisions declaring that, when the United States undertakes to represent Indian Tribes and agencies of the United States, it is "* * * faced with such a conflict [of interest] its representation of Indians is inadequate." [47]

---

[45] In Re Matter of the Determination of Conflicting Rights To The Use of Water From The Salt River Above Granite Reef Dam and Its Tributaries Including Tonto Creek, Excluding The Verde River And Its Tributaries. 484 F.Supp. 778 (U.S.D.C. D. Arizona, 1980).

[46] San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (CA 9, 1982); see Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080, 1089 (CA 9, 1982); reversed on grounds other than conflicts of interest, Slip Opinion, July 1, 1983, No. 81-2147 and No. 81-2188.

[47] *Ibid.*, at p. 1089.

CXVI.

In reversing the Court of Appeals, as it pertained to the disclaimer provisions of the Enabling Acts and the Constitutions of Arizona and Montana, the Supreme Court specifically declared that:

> In the cases before us, *assuming that the state adjudications are adequate to quantify the rights at issue in the federal suite* * * * we must conclude that the District Courts were correct in deferring to the state proceedings.[48]

The Supreme Court then added these most relevant statements:

> In a number of these cases, respondents have raised challenges, not yet addressed either by the Court of Appeals or in this opinion, [1] to the jurisidiction or [2] adequacy of the particular state proceeding at issue to adjudicate some or all of the rights asserted in the federal suit.[49]

CXVII.

To assure that the issues of jurisdiction and the adequacy of the state court proceedings can be properly reviewed in this Court, the Supreme Court said this:

> * * * the courts below should, if the need arises, allow whatever amendment of pleadings not prejudicial to other parties may be necessary to preserve in federal court those issues as to which the state forum lacks jurisidiction or is inadequate.[50]

---

[48] Slip Opinion, Supreme Court, July 1, 1983, pp, 22, 23. (Emphasis added)

[49] *Ibid.*, p. 23, ftn. 20.

[50] *Ibid.*

CXVIII.

Plaintiff Tribe Denies Both Jurisdiction And Adequacy Of W-1 Proceedings

On November 25, 1981, the Supreme Court of Arizona entered an Order purporting to consolidate all of the pending state court proceedings to adjudicate rights to the use of water in both the Salt and Gila River Drainage Systems. The November 25, 1981 Order included the truncated and limited proceedings initiated by the Salt River Valley Water Users' Association involving only the Salt River rights above Granite Reef Dam.[51] That Order did not and could not include the presently pending case of *United States v. City of Tucson, et al.*, Civ. No. 74-838 in the United States District Court for the District of Arizona. It is denied by the Plaintiff Tribe that the Supreme Court of Arizona, by its Order of November 25, 1981, created a "general adjudication" proceeding within the purview of the McCarran Amendment, 43 U.S.C. 666. It is likewise denied that the Supreme Court of Arizona is empowered in any way to subvert Plaintiff Tribe to state court proceedings by reason of the Tribe's immunity from suit.

CXIV.

There is no possibility of there being entered a decree adjudicating *inter sese* all rights in the watersheds of the Salt and Gila Rivers as seemingly intended by the Supreme Court of Arizona in its November 25, 1981 Order. Moreover, that proceedings, however it may be denominated, falls far short of being a "general adjudication" proceedings in a court of competent jurisdiction, among adversary parties for the purpose of resolving conflicting priorities respecting claimed rights to the use of water in a given stream system.

CXX.

As alleged above, there are numerous issues stemming directly from the Constitution, Treaties, and Laws of the United

---

[51] *Supra.*, p. 52, paragraph CX.

States concerning which the Arizona State Court proceedings are grossly inadequate to entertain, much less resolve. Included among those issues are: (1) the legal consequences flowing from the Covenant between Plaintiff White Mountain Apache Tribe and the United States of America, acting by and through Vincent Colyer, all as averred above;[52] (2) the nature, extent, and character of the obligations and responsibilities owing to Plaintiff Tribe by Defendants Secretary Watt and Attorney General Smith, principal agents of the United States Trustee to Plaintiff Tribe; (3) the jurisdiction, power, and authority of Defendant Secretary Watt to mismanage the Plaintiff Tribe's reserved rights to the use of water, its irrigable lands, grazing lands, and forest lands, for the benefit of the Salt River Federal Reclamation Project and the Central Arizona Federal Reclamation Project; and (4) the power and authority of Defendant Secretary Watt to suppress the development of the water resources within the White Mountain-Fort Apache Indian Reservation for the benefit of the above-named federal reclamation projects and related issues, and the consequences flowing from those illegal, arbitrary, and capricious acts of the Defendants.

CXXI.

Illegal, Ongoing Attempts By Defendants Secretary Watt And Attorney General Smith To Subvert Plaintiff Tribe's Reserved Rights To State Jurisdiction And Control

To avoid exposure, liability, and condemnation for attempted expropriation of Plaintiff Tribe's Salt River reserved rights to the use of water, Defendant Secretary Watt has undertaken to denegrate and diminish those rights to the fullest extent possible. There has been pleaded above the studies undertaken by the Department of the Interior seeking to constrict the Salt River rights of the Plaintiff Tribe. Most recently, Defendant Secretary Watt has renewed the request to enter upon the White Mountain-Fort Apache Indian Reservation to conduct "new studies" as to the irrigable acreage of the

---

[52] *Supra.*, p. 5, *et seq.*

White Mountain Apache Tribe. Additionally, Defendant Secretary Watt is attempting to place under state jurisdiction the control of the Tribe's Salt River reserved rights, all in keeping with the program to force the Tribe to negotiate away its rights.

CXXII.

In an effort to stifle and denegrate the reserved rights of Plaintiff Tribe in the Salt River and its tributaries, Defendant Secretary Watt, acting by and through subordinates, prepared a document entitled, "Water Rights Claims Of The United States As Trustee For The White Mountain Apache Tribe," That document was prepared for filing in the W-1 proceedings, now pending in the Superior Court of Maricopa County, Arizona. A copy of that claim, marked Appendix E, is attached to this Complaint and made a part of it by reference. As can be observed from the purported claim, Defendant Secretary Watt has abandoned over half of the Tribe's irrigable acreage. Additionally, Defendant Watt has prevented the Tribe from exercising its reserved rights and has induced an increased runoff away from the Reservation for the benefit of the Federal Reclamation Projects, all as alleged above.

CXXIII.

Unless restrained, Defendant Secretary Watt and Defendant Attorney General Smith will file in the W-1 proceedings that purported claim on behalf of the White Mountain Apache Tribe with the result that Secretary Watt will have invoked state court jurisdiction to denigrade Plaintiff Tribe's rights.

CXXIV.

In keeping with the broad policy, as espoused by Defendant Secretary Watt, Defendant Attorney General Smith, acting through Solicitor General Lee, filed their brief in the Supreme Court in the case of *Arizona v. San Carlos Apache,* wholly without authority, purportedly on behalf of the Plaintiff

White Mountain Apache Tribe. When belatedly informed that the Solicitor General had filed a brief in the Supreme Court on behalf of the White Mountain Apache Tribe, a demand was made by the Tribe that the Solicitor General inform the Supreme Court that he was not authorized to represent the Tribe. In response to that demand, the Solicitor General, by letter dated March 15, 1983, advised the Supreme Court that:

> *** in the review proceedings before this Court scheduled for argument next week, we do not speak for, or on behalf of the White Mountain Apache Tribe.

CXXV.

Additionally, Defendant Attorney General Smith, acting through the Solicitor General, wholly without right, advised the Supreme Court in the *San Carlos* proceedings that Defendant Attorney General Smith would agree to submitting the reserved rights of the Indian Tribes to the control and administration of the State of Arizona. That illegal, arbitrary, capricious, and totally unauthorized commitment by Defendant Attorney General Smith to the Supreme Court in the Case of *Arizona v. San Carlos* [53] constitutes a present and ongoing threat to Plaintiff Tribe which must be restrained.

CXXVI.

There is attached to this Complaint and made a part of it by reference a copy of a Resolution marked Appendix F, adopted by the governing body of the White Mountain Apache Tribe, which explicitly prohibits Defendant Secretary Watt and Defendant Attorney Smith from taking any action in regard to Plaintiff Tribe's Salt River rights.

---

[53] Petitions for rehearing in the Supreme Court in the *San Carlos* and *Northern Cheyenne* cases, Nos. 81-2147 and 81-2188, were denied.

CXXVII.

The conflicts of interest pleaded above by the Plaintiff Tribe are not limited to Defendant Secretary Watt, but rather they include Defendant Secretary Block. As pleaded above, Defendant Secretary Block is illegally occupying lands within the White Mountain-Fort Apache Indian Reservation.[54] There is, thus, presented the issue of the agencies of the United States illegally, capriciously, and without authority exercising the Tribe's rights for the benefit of non-Indian irrigation projects while simultaneously supressing the development by the Tribe of its rights and occupying lands, title to which resides in Plaintiff Tribe.

WHEREFORE, the White Mountain Apache Indian Tribe, Plaintiff, respectfully prays this Court to declare, adjudge, and determine that:

1. There are presented here by Plaintiff White Mountain Apache Tribe genuine, justifiable issues among the Tribe and the above named Federal and State officials arising under the Constitution, Treaties, and Laws of the United States of America, involving Plaintiff Tribe's reserved rights to the use of water in the Salt River and its tributaries and the adverse claims of Defendants to those rights, which issues pertain not only to the nature and extent of those rights, but likewise to the jurisdiction, control, and administration of them by Plaintiff Tribe, which issues also must be resolved if the Tribe's invaluable reserved rights are to be protected and its jurisdiction over those rights is to be properly exercised;

2. Defendant Secretary Watt and that official's subordinates are principal agents for the United States Trustee for the White Mountain Apache Tribe. In the status of agents for the United States Trustee, in representing the White Mountain Apache Tribe, Plaintiff, respecting its reserved rights to the use of water and the administration, management, and control of those reserved rights to the use of water, Defendant Secretary Watt and that

---

[54] *Supra.*, p. 26.

official's subordinates must perform their function in preserving, protecting, administering, and exercising those reserved rights to the use of water with the highest degree of care, skill, and diligence solely for the benefit of the White Mountain Apache Tribe, Plaintiff;

3. The representation of the White Mountain Apache Tribe, Plaintiff, by Defendant Secretary Watt and that official's subordinates, involving the Plaintiff Tribe's reserved rights to the use of water, is grossly inadequate due to the irreconcilable conflicts of interest in which Defendant Watt and his subordinates are immersed, and also due to the fact that Defendant Secretary Watt and that official's subordinates have in the past, and are presently exercising illegally virtually all of the Tribe's rights (which were reserved for the White Mountain-Fort Apache Reservation) for the use and benefit of the Salt River Federal Reclamation Project and the Central Arizona Federal Reclamation Project, both of which are administered or will be administered by Defendant Secretary Watt;

4. Defendant Watt and the subordinates of that official have intentionally, arbitrarily, capriciously, and beyond the scope of their authority mismanaged the White Mountain-Fort Apache Indian Reservation with the objective of inducing an increased flow of the Salt River and its tributaries away from the White Mountain-Fort Apache Indian Reservation for the benefit of the Salt River Federal Reclamation Project. By inducing an increased runoff of water from the Salt River and its tributaries, the quantity of water remaining on the Reservation has been reduced, thus depriving the grazing and forest lands of the Plaintiff Tribe of moisture essential for plant and tree growth, all to the irreparable and continuing damage of the Plaintiff Tribe;

5. The quantity of water illegally and intentionally induced to flow away from the White Mountain-Fort Apache Indian Reservation, all as pleaded by the Plaintiff Tribe, aggregates annually 100,000 acre feet of water which deprives the grazing and forest lands of Plaintiff Tribe of that quantity of water. If that quantity of water

were utilized by the Plaintiff Tribe, as it is entitled so to utilize it, Plaintiff Tribe could irrigate approximately 20,000 acres of land annually with the 100,000 acre feet of water of which it is deprived by the mismanagement of its Reservation for the benefit of the downstream Federal Reclamation Projects, all as pleaded by the White Mountain Apache Tribe, Plaintiff;

6. The representation by the Defendant Attorney General Smith and that official's subordinates, who are principal agents of the United States Trustee for the Plaintiff White Mountain Apache Tribe, due to their irreconcilable conflicts of interest, is inadequate in any litigation, or otherwise, state or Federal, including this Court, involving the reserved rights to the use of water of the Plaintiff White Mountain Apache Tribe in the Salt River and its tributaries;

7. The W-1 proceedings initiated in the Superior Court of Maricopa County, Arizona, is not a "general adjudication" and, therefore, does not come within the purview of the McCarran Amendment, 43 U.S.C. 666. Any effort on the part of Defendants Watt or Smith to force representation upon the Plaintiff Tribe in connection with those proceedings is illegal, arbitrary, capricious, and beyond the scope of their authority and should be restrained and prohibited by this Court;

8. The Superior Court of Maricopa County, Arizona, W-1 proceedings does not have jurisdiction over the reserved rights to the use of water of Plaintiff Tribe in the Salt River and its tributaries, the subject *res* of these proceedings;

9. This Court, pursuant to Federal law, has preempted state authority and, having exclusive jurisdiction over the reserved rights to the use of water of the White Mountain Apache Tribe, Plaintiff, in the Salt River and its tributaries, precludes the Superior Court of Maricopa County in the W-1 proceedings from undertaking to exercise jurisdiction for any purpose over those rights;

10. The conflict of interest issue, which arises under the Constitution, Treaties and Laws of the United States of America, involving the relationship between the Plaintiff White Mountain Apache Tribe, the Defendant Secretary Watt, Defendant Attorney General Smith, and all other Defendants, is within the exclusive jurisdiction of this Court. This Court is requested to declare, adjudge, and decree that the W-1 proceeding in the Superior Court of Maricopa County, Arizona, is wholly inadequate and most assuredly was never within the contemplation of Congress when it enacted the McCarran Amendment;

11. Defendant Secretary James G. Watt and the subordinates of that official, and Defendant Attorney General William French Smith, and the subordinates of that official, are hereby enjoined, restrained, and prohibited from taking any further action in the Superior Court of Maricopa County, Arizona, W-1 proceedings, or from entering upon the White Mountain-Fort Apache Indian Reservation for the purpose of obtaining and procuring data for use in any proceedings, state or Federal, involving the reserved rights to the use of water of the Plaintiff White Mountain Apache Tribe in the Salt River and its tributaries;

12. The title of the Plaintiff White Mountain Apache Tribe in and to the 14,000 acres of land presently occupied by Defendant Secretary Block, and subordinates of that official, is quieted against the claims of the aforesaid Defendant Secretary Block and subordinates of that official; and those officials are hereby enjoined and restrained from further occupying the lands comprising the 14,000 acres, presently, through error, included within the interior boundaries of the Sitgreaves and Apache National Forests;

13. Neither the Superior Court of Maricopa County, Arizona, W-1 proceedings, nor the Judge of that Court, the Attorney General of the State of Arizona, the Commissioner, Arizona State Land Department, Judge Stanley Z. Goodfarb, of the Maricopa County Superior Court, or any other tribunals or officials of the State of Arizona, or the State of Arizona have jurisdiction, control, authority, or

power over the reserved rights to the use of water of the Plaintiff White Mountain Apache Tribe in the Salt River and its tributaries. This Court is hereby requested to restrain and prohibit those officials or any officials under their direction, or any Arizona Court or tribunal from seeking to exercise jurisdiction, control, authority, or power of administration over the Plaintiff Tribe's reserved rights in the Salt River and its tributaries;

14. The Defendant Secretary Watt and the subordinates of that official, the officials of the Bureau of Reclamation and the Bureau of Indian Affairs, and the Solicitor of the Department of Interior, and subordinates of that official, are prohibited, due to their all-encompassing conflicts of interest respecting the reserved rights to the use of water of the Plaintiff White Mountain Apache Tribe in the Salt River and its tributaries, from taking any action in regard to those rights to the use of water and it is hereby requested that those officials be restrained, enjoined, and prohibited from taking any action respecting the Plaintiff Tribe's Salt River reserved rights, the subject *res* of these proceedings.

Respectfully submitted

WILLIAM H. VEEDER

William H. Veeder
818 18th Street N.W., #920
Washington, D.C. 20006
[202] 466-3890

ROBERT C. BRAUCHLI

Robert C. Brauchli
P.O. Box 700
Whiteriver, Arizona 85941
[602] 368-0251

Attorneys for
White Mountain Apache Tribe

Dated:

APPENDIX A-1

Walapai Reserve.

(See Hualapai.)

White Mountain or San Carlos Reserve.

[Formerly called White Mountain or Camp Apache Reserve. Occupied by Arivaipa, Chilion, Chiricahua, Coyotero, Membreno, Mogolion, Mohave, Pinal, San Carlos, Tonto, and Yuma-Apache tribes; area 2,866 square miles; established by Executive orders, acts of February 20, 1893 (27 Stat. 469), and June 10, 1898 (29 Stat., 358).]

ENGINEER'S OFFICE,
HEADQUARTERS MILITARY DIVISION OF THE PACIFIC,
San Francisco, Cal., January 31, 1870.

SIR: I respectfully forward the following description of the proposed Indian reservation in Arizona; the boundaries of the reservation to be as follows, as shown in red on the accompanying map: Starting at the point of intersection of the boundary between New Mexico and Arizona with the south edge of the Black Mesa, and following the southern edge of the Black Mesa, to a point due north of Sombrero or Plumoso Butte; then in the direction of the Picache Colorado to the crest of the Apache Mountains, following said crest down the Salt River to Pinal Creek, and then up the Pinal Creek to the top of the Pinal Mountains; then following the crest of the Pinal Range, "the Cordilleras de la Gila," the "Almagra Mountains," and other mountains bordering the north bank of the Gila River, to the New Mexican boundary near Steeple Rock; then following said boundary north to its intersection with the south edge of the Black Mesa, the starting-point.

H. M. ROBERT,
Major Engineers.

General W. D. WHIPPLE,
Adjutant-General Military Division of the Pacific.

DEPARTMENT OF THE INTERIOR,
BOARD OF INDIAN COMMISSIONERS,
Camp Apache, Arizona Territory, September 5, 1871.

SIR: As the White Mountain region has been set apart by the War Department as an Indian reservation, and there are several bands of peaceably disposed Apaches, who have for many years lived in this country, who can not be removed without mush suffering to themselves, risk of war and expense to the Government, I have concluded to select the White Mountain Reservation, the boundaries of which were defined in letter of H. M. Robert, major of Engineers, dated Headquarters Military Division of the Pacific, San Francisco, Cal., January 31, 1870, as one of the Indian reservations upon which the Apache Indians of Arizona may be collected, fed, clothed, and otherwise provided for and protected, agreeable to the power conferred upon me at the suggestion of the President by the honorable Secretary of the Interior, under date July 21, 1871, and supplementary orders July 31, 1871, copies of which are herewith inclosed.

Agreeable to your wish that I should name the articles and amount of provisions to be issued, I would suggest that one pound of beef and one pound of corn per capita be issued with salt daily, and sugar and coffee occasionally.

Very respectfully, your obedient servant,

VINCENT COLYER,
Commissioner.

Lieut. COL. JOHN GREEN,
First Cavalry U.S.A., Commanding
Camp Apache, Arizona Territory.

DEPARTMENT OF THE INTERIOR,
BOARD OF INDIAN COMMISSIONERS,
Washington, D.C., November 7, 1871.

SIR: Reservations for the roving Apache Indians of New Mexico and Arizona were selected under your instructions of 21st July, 1871, as follows:

For the Mimbres and Coyoteros at Tularosa Valley,[a] in New Mexico. (See accompanying paper A.)

For the Coyoteros and Chiloccos of Arizon, at Camp Apache, in White Mountains, Arizon. (See Appendix B.)

For the Arrivapis and Pinals, at Camp Grant, Arizona. (See Appendix C and accompanying map.)

For the Mohave Apaches, at Camp Verde, Arizona. (See Appendix D.)

A detailed description of the Camp Apache Reservation, which was established by Major-General Thomas, will be found on file in the War Department.

I also requested, with the advice of General Crook and the several post commanders, that temporary asylums, where the Tontos, Hualapais, and Western band of Apache Mohaves might be protected and fed, should be established at Camp McDowell, Beal Spring, and Date Creek, until such times as the Indians collected there could be removed to the above reservations.

Very respectfully, etc.,

VINCENT COLYER.

Hon. C. Delano,
Secretary of the Interior, Washington, D.C.

---

[a] For the Executive order setting apart Tularosa Valley Reserve see New Mexico, post page 878.

DEPARTMENT OF THE INTERIOR,

Washington, D.C., November 7, 1871.

SIR: I have the honor to trasmit herewith a copy of a communication addressed to this Department by the Hon. Vincent Colyer, one of the board of Indian peace commissioners who recently visited Arizona, wherein he states his views in relation to the Apache Indians, and describes certain tracts of country in Arizona and New Mexico which, during his recent visit to said Indians, he has selected to be set apart as reservations for their use, as authorized to do by orders issued to him before visiting the Apaches.

I have the honor to recommend, in pursuance of the understanding arrived at in our conversation with the Secretary of War on the 6th instant, that the President issue an order authorizing said tracts of country described in Mr. Colyer's letter to be regarded as reservations for the settlement of Indians until it is otherwise ordered.* * *

I would further suggest that the War Department will, for the present, select some suitable and discreet office of the Army to act as Indian agent for any of the reservations in Arizona which may be occupied by the Indians, under the order herein contemplated. Such agents will be superseded by persons hereafter appointed by this Department, at such times as the President may hereafter deem proper.

Very respectfully, your obedient servant,

C. DELANO,
Secretary.

THE PRESIDENT.

These recommendations were approved by the President as follows:

EXECUTIVE MANSION,
Washington, D.C., November 9, 1871.

Respectfully referred to the Secretary of War, who will take such action as may be necessary to carry out the recommendations of the Secretary of the Interior.

U. S. GRANT.

And indorsed by General Sherman thus:

HEADQUARTERS ARMY OF THE UNITED STATES,
Washington, D.C., November 9, 1871.

GENERAL: I now inclose you copies of a correspondence between the Secretary of the Interior and War Department on the subject of the policy that is to prevail in Arizona with the Apache Indians. The Secretary of War wishes you to give all the necessary orders to carry into full effect this policy, which is the same that prevails in the Indian country generally, viz: to fix and determine (usually with the assent expressed or implied of the Indians concerned) the reservation within which they may live and be protected by all branches of the Executive Government; but if they wander outside they at once become objects of suspicion, liable to be attacked by the troops as hostile. The three reservations referred to in these papers, and more particularly defined in the accompanying map, seem far enough removed from the white settlements to avoid the dangers of collision of interest. At all events these Indians must have a chance to escape war, and the most natural way is to assign them to homes and to compel them to remain thereon. While they remain on such reservations there is an implied condition that they should not be permitted to starve, and our experience is that the Indian Bureau is rarely supplied with the necessary money to provide food, in which event you may authorize the commissary department to provide for them, being careful to confine issues only to those acting in good faith, and only for absolute wants.

The commanding officer of the nearest military post will be the proper person to act as the Indian agent until the regular agents come provided with the necessary authority and funds to relieve them; but you may yourself, or allow General Crook to appoint these temporary agents regardless of rank.

The citizens of Arizona should be publicly informed of these events, and that the military have the command of the President to protect these Indians on their reservations, and that under no pretense must they invade them, except under the leadership of the commanding officer having charge of them.

The boundaries of these reservations should also be clearly defined, and any changes in them suggested by experience should be reported, to the end that they may be modified or changed by the highest authority.

After general notice to Indians and whites of this policy, General Crook may feel assured that whatever measures of severity he may adopt to reduce these Apaches to a peaceful and subordinate condition will be approved by the War Department and the President."

I am, your obedient servant,

W. T. SHERMAN,
General.

Gen. J. M. SCHOFIELD,
Commanding Military Division Pacific.

EXECUTIVE MANSION, December 14, 1872.

It is hereby ordered that the following tract of country be, and the same is hereby, withheld from sale and set apart as a reservation for certain Apache Indians in the Territory of Arizona, to be known as the "Chiricahua Indian Reservation," viz:

Beginning at Dragoon Springs, near Dragoon Pass, and running thence northeasterly along the north base of the Chiricahua Mountains to a point on the summit of Peloncillo Mountains or Stevens Peak range; thence running southeasterly along said range through Stevens Peak to the boundary of New Mexico; thence running south to the boundary of Mexico;

thence running westerly along said boundary 55 miles; thence running northerly, following substantially the western base of the Dragoon Mountains, to the place of beginning.

It is also hereby ordered that the reservation heretofore set apart for certain Apache Indians in the said Territory, known as the "Camp Grant Indian Reservation," be, and the same is hereby, restored to the public domain.

It is also ordered that the following tract of country be, and the same is hereby, withheld from sale and added to the White Mountain Indian Reservation in said Territory, which addition shall hereafter be known as the "San Carlos division of the White Mountain Indian Reservation," viz:

Commencing at the southeast corner of the White Mountain Reservation as now established, and running thence south to a line 15 miles south of and parallel to the Gila River; thence west along said line to a point due south of the southwest corner of the present White Mountain Reservation; thence north to the said southwest corner of the aforesaid White Mountain Reservation, and thence along the southern boundary of the same to the place of beginning; the said addition to be known as the "San Carlos division of the White Mountain Reservation," which will make the entire boundary of the White Mountain Reserve as follows, viz:

Starting at the point of intersection of the boundary between New Mexico and Arizona with the south edge of the Black Mesa, and following the southern edge of the Black Mesa to a point due north of Sombrero or Plumoso Butte; thence due south to said Sombrero or Plumoso Butte; thence in the direction of the Piache Colorado to the crest of the Apache Mountains, following said crest down the Salt River to Pinal Creek to the top of the Pinal Mountains; thence due south to a point 15 miles south of the Gila River; thence east with a line parallel with and 15 miles south of the Gila River to the boundary of New Mexico; thence north along said boundary line to its intersection with the south edge of the Black Mesa, the place of beginning.

U.S. GRANT.

DEPARTMENT OF THE INTERIOR,
Washington, D.C., July 30, 1873.

Respectfully submitted to the President, with the recommendation that all that portion of the valley of the Gila River in the Territory of Arizona hitherto included in the San Carlos division of the White Mountain Indian Reservation as established by Executive order dated December 14, 1872, lying east of and above the site of old Camp Goodwin, be restored to the public domain, as recommended by the Acting Commissioner of Indian Affairs.

B. R. COWAN,
Acting Secretary.

EXECUTIVE MANSION,
August 5, 1873.

Agreeable to the above recommendation of the Acting Secretary of the Interior, it is hereby ordered that the land therein described be restored to the public domain.

U.S. GRANT.

EXECUTIVE MANSION, *July 21, 1874.*

It is hereby ordered that all that portion of the White Mountain Indian Reservation in Arizona Territory lying east of 109 degrees 30 minutes west longitude be restored to the public domain.

U. S. GRANT.

EXECUTIVE MANSION, *April 27, 1876.*

It is hereby ordered that all that portion of the White Mountain Indian Reservation in Arizona Territory lying west of the following-described line, viz: Commencing at the northwest corner of the present reserve, a point at the southern edge of the Black Mesas, due north of Sombrero or Plumoso Butte; thence due south to said Sombrero or Plumoso Butte; thence south-

eastwardly to Chromo Peak; thence in a southerly direction to the mouth of the San Pedro River; thence due south to the southern boundary of the reservation, be, and the same hereby is, restored to the public domain.

U. S. GRANT.

EXECUTIVE MANSION, *October 30, 1876.*

It is hereby ordered that the order of December 14, 1872, setting apart the following-described lands in the Territory of Arizona as a reservation for certain Apache Indians, viz, beginning at Dragoon Springs, near Dragoon Pass, and running thence northeasterly along the north base of the Chiricahua Mountains to a point on the summit of Peloncillo Mountains, or Stevens Peak Range; thence running southeasterly along said range through Stevens Peak to the boundary of New Mexico; thence running south to the boundary of Mexico; thence running westerly along said boundary 56 miles; thence running northerly, following substantially the western base of the Dragoon Mountains, to the place of beginning, be, and the same is hereby, canceled, and said lands are restored to the public domain.

U. S. GRANT.

EXECUTIVE MANSION, *January 26, 1877.*

It is hereby ordered that all that portion of the White Mountain Indian Reservation in Arizona Territory lying within the following-described boundaries, viz: Commencing at a point known as corner I of survey made by Lieut. E. D. Thomas, Fifth Cavalry, in March, 1876, situated northeast of, and 313 chains from, flag-staff of Camp Apache, magnetic variation 13 degrees 48 minutes east; thence south 68 degrees 34 minutes west, 360 chains, to corner II, post in monument of stones, variation 13 degrees 45 minutes east; thence south 7 degrees 5 minutes west, 240 chains, to corner III, post in monument of stones, variation 13 degrees 43 minutes east;

thence north 68 degrees 34 minutes east, 360 chains, to corner IV, post in monument of stones, magnetic variation 13 degrees 42 minutes east; thence north 7 degrees 15 minutes east, 240 chains, to place to beginning, comprising 7,421.14 acres, be restored to the public domain.

U. S. GRANT.

EXECUTIVE MANSION, *March 31, 1877.*

It is hereby ordered that all that portion of the White Mountain Indian Reservation in the Territory of Arizona lying within the following-described boundaries be, and the same hereby is, restored to the public domain, to wit: Commencing at a point at the south bank of the Gila River where the San Pedro empties in the same; thence up and along the south bank of said Gila River 10 miles; thence due south to the southern boundary of the said reservation; thence along the southern boundary to the western boundary thereof; thence up said western boundary to the place of beginning.

R. B. HAYES.

APPENDIX E-1

IN THE SUPERIOR COURT

MARICOPA COUNTY, STATE OF ARIZONA

W-1

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE SALT RIVER SYSTEM AND SOURCE

WATER RIGHTS CLAIM OF THE UNITED STATES AS TRUSTEE FOR THE WHITE MOUNTAIN APACHE TRIBE

A. *Introduction*

The attached water rights claim is submitted by the United States of America as trustee for the White Mountain Apache Indian Tribe. In submitting this claim the United States hereby expressly provides that it is not conceding that this Court has jurisdiction over the United States government in this matter. The attached claim is submitted as a result of a judicially imposed filing deadline, and is not intended to effect a waiver of any jurisdictional defenses which may exist now or may arise hereafter.

It is also the position of the United States that this claim does not in any way effect a waiver of the Tribe's immunity from suit. In fact, it is the position of the government that the Tribe's immunity from suit has not been waived by the McCarran Amendment (43 U.S.C. § 666), and that the Tribe has not in any way been made a party to this proceeding. The Tribe can become a party to this proceeding only if it chooses to intervene on its own behalf.

In order to provide some visual representation of the irrigable lands portion of the claim, maps have been attached

which indicate the general location of the irrigable lands for which water rights have been claimed herein. However, since the majority of the irrigation water rights claim involves land which has not been historically irrigated, the maps cannot indicate with precision the areas that will actually be cultivated in the future. Accordingly, it is hereby expressly provided that the claim for the irrigation water right is governed by the amount claimed in that portion of the written claim and is not governed by the maps which are attached to this claim.

B. *Legal basis for the claim*

The legal basis for this claim is the federal reserved water rights doctrine as recognized by the Supreme Court of the United States. See *United States* v. Winters, 207 U.S. 564 (1980), *Arizona* v. *California,* 373 U.S. 546 (1963), and *United States* v. *Cappaert* 426 U.S. 128 (1976). The claim asserted herein is based on the intention of the Congress and the President to create a homeland for the White Mountain Apache Indians in a geographical area where water ". . . would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." *Arizona* v. *California, supra,* 373 U.S. at 599. Through this claim the United States claims sufficient water to provide for the agricultural, recreational, municipal/domestic, industrial, stockgrazing and other present and future water uses to fulfill the purposes of the White Mountain Apache Reservation and to maintain the reservation as a permanent tribal homeland for the White Mountain Apache Indians.

C. *Priority date for the water rights claimed*

The White Mountain Apache Indians have occupied the area of their present reservation and adjacent lands for many hundreds of years. *See San Carlos Apache Tribe of Arizona, White Mountain Apache Tribe of Arizona, and Western Apache Indians, et al.* v. *United States,* No. 22-D, 21 Indian Claims Commission 189 (June 27, 1969). Accordingly, this entire water rights claim is made on the basis of a priority date of time immemorial.

The United States government has entered into certain Agreements and Treaties with the Apache Indians including, but not limited to, the Treaty of Santa Fe dated July 1, 1852. The existing White Mountain Apache Indian Reservation was delineated and set apart by the federal government on January 31, 1870. The Reservation was confirmed by President U.S. Grant on November 9, 1871. Other Executive Branch actions which affected the creation of the Reservation occurred on September 5, 1871, November 7, 1871, and December 14, 1872. See Kappler, Indian Affairs Laws and Treaties (1904) pp. 810-814.

D. *Future water uses*

A significant portion of the water rights claim asserted herein relates to anticipated future water needs which will be required to make the Reservation a useful and productive homeland for the White Mountain Apache Indians. Due to a variety of circumstances specific plans and time schedules are not available at this time in relation to the anticipated future uses. When such plans and time schedules become available to the United States, the govenment will submit the plans and schedules to the Court.

E. *Powersite uses*

The powersite water uses delineated in this claim include five powersites located on the Salt and Black Rivers, as follows: Lower Black River, Black River Pumps, Carrizo, Knob and Walnut Canyon. These specific powersites are located on the common boundary between the White Mountain Apache and San Carlos Apache Reservations. Accordingly, these powersites reflect a shared water right, one half of which is contributed by, and therefore claimed on behalf of, each Reservation.

(CERTAIN ATTACHMENTS OMITTED HERE)

HISTORIC IRRIGATED LAND CLAIMS

Fort Apache Indian Reservation, Arizona

Area Number	Approximate Acreage (acres)	Water Supply Source	Water Duty AF
1	43	Canyon Creek; tributary of Salt River	207
2	58	Oak Creek; Canyon Creek; tributary of Salt River	280
3	4	Canyon Creek; tributary of Salt River	19
5	53	Cibecue Creek; tributary of Salt River	255
6	4	Spring Creek; Cibecue Creek; tributary of Salt River	19
7	662	Cibecue Creek; tributary of Salt River	3,191
8	123	Carrizo Creek; tributary of Salt River	593
9	112	Blue Springs; Carrizo Creek; tributary of Salt River	539
10	142	Cedar Creek; Carrizo Creek; tributary of Salt River	736
11	72	Carrizo Creek; tributary of Salt River	347
12	12	Corduroy Creek; Carrizo Creek; tributary of Salt River	32
13	9	Corduroy Creek; Carrizo Creek; tributary of Salt River	24
14	19	Corduroy Creek; Carrizo Creek; tributary of Salt River	98
15	16	Limestone Canyon; Carrizo Creek; tributary of Salt River	77
16	511	N.F. White River; tributary of White River	2,647
17	799	E.F. White River, tributary of White River	4,139
18	134	White River	694
19	16	Big Bonito Creek; tributary of Black River	43
20	49	Turkey Creek; tributary of Black River	131
21	25	Pacheta Creek; tributary of Black River	67
22	9	Little Bonito Creek; Bonito Creek; tributary of Black River	24
23	13	Paddy Creek; triburary of Black River	35
24	260	White River	946
Totals	3,145 Acres		15,143AF

FUTURE IRRIGATED LAND CLAIMS

Fort Apache Indian Reservation, Arizona

Area Number	Approximate Acreage (acres)	Water Supply Source	Water Duty AF
4	382	Salt River Main Stem	2,231
11	2	Limestone Canyon; Carrizo Creek; tributary Salt River	10
16	90	N.F. White River; tributary of White River	466
17	288	E.F. White River; tributary of White River	1,492
24	6,402	E.F. White River; tributary of White River	28,691
25	50	Corduroy Creek; Carrizo Creek; tributary of Salt River	259
26	153	E.F. Cedar Creek; Carrizo Creek; tributary of Salt River	793
27	530	Forestdale Creek; Corduroy Creek; tributary of Salt River	2,745
28	70	Corduroy Creek; Carrizo Creek; tributary of Salt River	363
29	30	Corduroy Creek; Carrizo Creek; tributary of Salt River	155
30	80	First Hollow; Carrizo Creek; tributary of Salt River	214
31	80	Corduroy Creek; Carrizo Creek; tributary of Salt River	214
32	50	Gomez Creek; Gooseberry Creek; tributary of N.F. White River	134
33	50	Bull Cienega Creek; tributary of N.F. White River	134
34	130	Bull Cienega Creek; tributary of N.F. White River	347
35	20	North Fork of the White River	53
36	50	North Fork of the White River	134
37	500	McNary Ditch; Gooseberry Creek; tributary of N.F. White River	1,335
38	60	McNary Ditch and Gooseberry Creek; tributaries to N.F. White River	160
39	20	Boy Spring; tributary to N.F. White River	53
40	50	McNary Ditch; tributary ot N.F. White River	134
41	404	Bog Creek and McNary Ditch; tributaries to N.F. White River	1,079
42	5,067	Big Bonito Creek; tributary of Black River	18,444
Totals	14,558 Acres		59,640AF

APPENDIX F-1

RESOLUTION OF THE WHITE MOUNTAIN APACHE TRIBE OF THE FORT APACHE INDIAN RESERVATION

WHEREAS, The White Mountain Apache Tribe is holder of the full equitable title to the lands comprising the Fort Apache Indian Reservation and to the rights to the use of water in the Salt River and its tributaries, which arise upon the Tribe's reservation in quantities adequate to meet the Tribe's present and future water requirements with a priority dating from time immemorial; and

WHEREAS, The United States of America, trustee for the White Mountain Apache Tribe, is holder of the naked legal title to the lands comprising the Fort Apache Indian Reservation and the Tribe's life-sustaining Salt River rights to the use of water, solely for the benefit of the Tribe; and

WHEREAS, Although the Attorney General, William French Smith, and the Secretary of Interior, James G. Watt, are principal agents of the United States, trustee for the White Mountain Apache Tribe, those officers are totally immersed in conflicts of interest of the character that precludes them from fulfilling their responsibilities to the Tribe but, to the contrary, are aggressively seeking in bad faith to take from the Tribe its Salt River rights to the use of water; and

WHEREAS, There has at all times resided in the White Mountain Apache Tribal Council, the governing body of the Tribe, the inherent sovereign power, the responsibility and obligation to protect, preserve, conserve and utilize the Tribe's invaluable Salt River rights to the use of water, the Secretary of Interior having confirmed and reaffirmed those inherent powers by approving the Tribe's Constitution and Bylaws; and

WHEREAS, The White Mountain Apache Tribe has at all times resisted the efforts of Attorney General Smith and Secretary of Interior Watt to force the Tribe and the Tribe's invaluable rights into the pending water rights proceeding, No.

W-1, in the Superior Court of Maricopa County, and has denied the right of those officials or their subordinates to prepare claims for filing with the Maricopa County Court; and

WHEREAS, The White Mountain Apache Tribe has been advised by letters dated December 7, 1981, and January 29, 1982, that the Secretary of Interior and the Attorney General have demanded that a claim be prepared for filing in the state court, No. W-1 proceeding; and

WHEREAS, The Tribe has been advised that, by the two communications of December 7, 1981, and January 29, 1982, the data relied upon for the preparation of the Tribe's claim in the state court

> . . . consists primarily of the VTN 1974 Report, the materials prepared for the *Arizona v. California* litigation, the partially completed data prepared by the HKM Engineering firm, and other miscellaneous materials; and

WHEREAS, In fact, Steven Carroll of the Department of Justice, acting for the Attorney General, and Richard B. Jefferies and William H. Swan of the Department of Interior, acting for the Secretary, did prepare for filing on January 14, 1982, a "Water Rights Claim Of The United States As Trustee For The White Mountain Apache Tribe," which claim was not filed by the Attorney General because he was restrained from making that filing by reason of an order entered in the Phoenix federal court in the case of *United States v. White Mountain Apache Tribe;* and

WHEREAS, The Tribe's steadfast contention that the state court in the No. W-1 proceeding lacked jurisdiction has been fully affirmed by the recent decisions of the United States Court of Appeals for the Ninth Circuit, resulting in both state and federal proceedings being held in abeyance awaiting final disposition of the Court of Appeals' decisions; there remains, nevertheless, the fact that, at the direction of Attorney General Smith and Secretary Watt, there was prepared for filing on January 14, 1982, the flagrantly false water rights claim, which must be retracted by Attorney General Smith and Secretary Watt, if the Tribe's Salt River rights are to be protected; and

WHEREAS, The White Mountain Apache Tribal Council directed its Special Counsel to review in depth the January 14, 1982 water rights claim and the data relied on in the preparation of the water rights claim; and

WHEREAS, The Special Counsel, by a March 9, 1982 Memorandum, recommended that the Tribal Council make a demand for the retraction of the illegal and grossly-in-error "Water Rights Claim Of The United States As Trustee For The White Mountain Apache Tribe" and reject the data relied on by the Interior and Justice Departments in preparing the water rights claim, the Memorandum being attached to this Resolution and made a part of it by reference to the same extent and with the same effect as if set forth herein in full; and

WHEREAS, The Tribal Council adopts the March 9, 1982 Memorandum prepared by Special Counsel;

NOW, THEREFORE, BE IT RESOLVED THAT Attorney General Smith and Secretary Watt, as principal agents of the Trustee United States for the White Mountain Apache Tribe, must retract all aspects of the January 14, 1982 "Water Rights Claim Of The United States As Trustee For the White Mountain Apache Tribe" and that those principal agents of the Trustee United States reject the flagrantly false, grossly inadequate and totally inaccurate January 14, 1982 water rights claim and that those officials advise the White Mountain Apache Tribe in writing of the action taken by them pursuant to this demand; and

BE IT FURTHER RESOLVED THAT Attorney General Smith and Secretary Watt, if they fail to reject in writing the January 14, 1982 water rights claim and the grossly erroneous data relied upon in the preparation of the water rights claim, that they direct the aforesaid subordinate officials of the Interior and Justice Departments to appear before the Tribal Council on a date to be specified by the Tribal Council and there to state under oath any justifications that they may have for the preparation of the flagrantly false, grossly inaccurate and totally insufficient January 14, 1982 water rights claim and likewise to justify why they relied upon

> . . . the VTN 1974 Report, the materials prepared for the *Arizona v. California* litigation, the partially completed data prepared by the HKM Engineering film, and other miscellaneous materials,

having been fully informed by the White Mountain Apache Tribe that the data were gravely in error, lacked credibility and that reliance upon the data could do nothing but cause irreparable and continuing damage to the White Mountain Apache Tribe; and

BE IT FURTHER RESOLVED THAT the Chairman of the White Mountain Apache Tribe take such further and additional action as is requisite to protect the Tribe's interests aginst the flagrantly false claim prepared for filing on January 14, 1982, and to advise Attorney General Smith And Secretary Watt and all other officials in the Executive and Legislative Branches of the United States that the Tribe must be protected against the violations of the Tribe's invaluable Salt River rights by officials, both in and outside of the United States Government.

The foregoing resolution was on the 9th day of March, 1982, duly adopted by a vote of 10 for and 0 against by the Tribal Council of the White Mountain Apache Tribe, pursuant to authority vested in it by Article V, Section 1, (i) and (f) of the Amended Constitution and By-Laws of the Tribe, ratified by the Tribe June 27, 1958, and approved by the Secretary of Interior on May 29, 1958, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).

/s/ RONNIE LUPE

Chairman of the Tribal Council

/s/ MARY ENDFIELD

Secretary of the Tribal Council

(3)

No. 86-375

Supreme Court, U.S.
FILED
NOV 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE WHITE MOUNTAIN APACHE TRIBE, PETITIONER

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

EDWARD J. SHAWAKER
MARTIN W. MATZEN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

15pp

QUESTION PRESENTED

Whether the courts below correctly rejected the attempt by petitioner White Mountain Apache Tribe to prevent the Attorney General and other Executive Branch officials from preparing and submitting on behalf of the United States, as a party to a general stream adjudication in state court, claims to reserved water rights owned by the United States in trust for petitioner.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Arizona v. *California*, 460 U.S. 605	3, 7
Arizona v. *San Carlos Apache Tribe*, 463 U.S. 545	3, 5, 6, 8, 9, 10
Block v. *North Dakota*, 461 U.S. 273	9
Colorado River Water Conservation Dist. v. *United States*, 424 U.S. 800	2, 9, 10
Confiscation Cases, 74 U.S. (7 Wall.) 454	10
Heckler v. *Chaney*, 470 U.S. 821	10
Heckman v. *United States*, 224 U.S. 413	9
Nevada v. *United States*, 463 U.S. 110	7, 9, 10
Northern Cheyenne Tribe v. *Adsit*, 721 F.2d 1187	4, 10
Ponzi v. *Fessenden*, 258 U.S. 254	10
Swift & Co. v. *United States*, 276 U.S. 311	10
United States v. *Dann*, 470 U.S. 39	6
United States v. *San Jacinto Tin Co.*, 125 U.S. 273	10
United States v. *Superior Court in and for Maricopa County*, 144 Ariz. 265, 697 P.2d 658	6-7
United States v. *White Mountain Apache Tribe*, 604 F. Supp. 464, aff'd, 784 F.2d 917	3, 5, 9
White Mountain Apache Tribe v. *Smith*, No. 81-1205 (D.D.C. June 23, 1981), aff'd, 675 F.2d 1341, cert. denied, 463 U.S. 1228	4

Statutes and rule:

Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 25 U.S.C. (1976 ed.) 70 *et seq.*	6

Statutes and rule—Continued: Page

McCarran Amendment, 43 U.S.C. 666 ..... 2, 5, 6, 9, 10
Quiet Title Act, 28 U.S.C. 2409a(f) 6
5 U.S.C. 701(a)(2) 10
5 U.S.C. (& Supp. II) 702(2) 9
28 U.S.C. 516 9
28 U.S.C. 519 9
Fed. R. Civ. P. 54(b) 6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-375

THE WHITE MOUNTAIN APACHE TRIBE, PETITIONER

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1c-10c) is reported at 784 F.2d 921, and the opinion of the district court (Pet. App. 1a-11a) is reported at 604 F. Supp. 185.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1986, and the petition for rehearing was denied on June 3, 1986 (Pet. App. 1d). The petition for a writ of certiorari was filed on September 2, 1986, the day following Labor Day, a federal legal

holiday. See Sup. Ct. R. 29.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns claims to water for the Fort Apache Indian Reservation in Arizona, which is the home of petitioner White Mountain Apache Tribe.

1. The United States has been joined as a defendant in proceedings initiated in the Superior Court for Maricopa County, Arizona, for the determination of all rights to water in the Gila River system. *In re the General Adjudication of All Rights to Use Water in the Gila River Systems and Sources*, W-1 through W-4 (consolidated) (hereinafter cited as *W-1*). The United States was made a party to the state court proceedings pursuant to the McCarran Amendment, 43 U.S.C. 666, in which Congress has given its consent "to join the United States as a defendant in any suit * * * for the adjudication of rights to the use of water of a river system or other source * * * where it appears that the United States is the owner of * * * water rights * * * and the United States is a necessary party to such suit." In *W-1*, the superior court will adjudicate the water rights of private claimants as well as the various water rights of the United States, including rights reserved and held by the United States in trust for Indian Tribes. The Fort Apache Indian Reservation is one of the Reservations for which the United States must, as trustee, submit water-right claims in *W-1*.

2. In *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 809-813 (1976), this Court held that the McCarran Amendment grants the necessary consent to join the United States as a defendant in a general stream adjudication in state

court even with respect to reserved water rights owned by the United States in trust for Indians. And in *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983), the Court specifically held that the United States District Court in Arizona had properly deferred to state court proceedings in *W-1* for the adjudication of Indian water rights. Petitioner nevertheless has strenuously objected to the United States' submission to the superior court in *W-1* of water-right claims for the Fort Apache Reservation. To date, petitioner likewise has declined to intervene in *W-1* in order to present water-right claims on its own behalf, as the state courts have indicated it may do (Pet. App. 7c). See *Arizona* v. *California*, 460 U.S. 605, 613-615 (1983). Instead, the Tribe has sought to prevent the United States from participating. See Pet. App. 4c-5c; see also *United States* v. *White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986).

a. Petitioner's first such effort was by way of a suit in the United States District Court for the District of Columbia seeking an injunction barring the Federal Government from filing a claim for the Fort Apache Reservation in *W-1*. There, as here, the Tribe alleged that *W-1* was not a proper McCarran Amendment proceeding and that the Attorney General would, unless restrained, appear and submit the Tribe's water rights for adjudication in *W-1* notwithstanding the state court's asserted lack of jurisdiction. In addition, the Tribe alleged that the Attorney General and the Secretary of the Interior were incapable of adequately representing the Tribe in *W-1* due to "all pervasive" conflicts of interest arising from their simultaneous duty to represent the United States with respect to its own water rights. There, as

in this case, the Tribe specifically relied upon the United States' alleged mismanagement of the Tribe's natural resources in favor of the Salt River Reclamation Project as the crux of the supposed conflict of interest and inability fairly to represent the Tribe's water interests in *W-1*. See Complaint at paras. III, XIII, XVI n.2, *White Mountain Apache Tribe* v. *Smith*, No. 81-1205 (D.D.C. June 23, 1981). The district court dismissed that case, finding that it lacked jurisdiction "over the Attorney General's exercise of litigating judgment" and that the Tribe had "an adequate remedy at law in [the *W-1* proceeding] subject, as it is, to potential appellate review in the United States Supreme Court." The Court of Appeals for the District of Columbia Circuit affirmed (675 F.2d 1341 (1982)), and this Court denied certiorari (463 U.S. 1228 (1983)).

b. After petitioner failed in the District of Columbia litigation, petitioner initiated an action in its own tribal court to achieve essentially the same result. On December 23, 1981, the tribal court issued a temporary restraining order prohibiting four employees of the Department of the Interior from transferring any materials or documentation to the Department of Justice for use in *W-1*. The United States then brought an action in the United States District Court for the District of Arizona seeking an injunction barring petitioner from interfering, through its tribal court or otherwise, with the performance by officers of the United States of their official duties in connection with *W-1*. The district court granted a permanent injunction to that effect after this Court's decision in *San Carlos Apache Tribe* and the Ninth Circuit's decision on remand in *Northern Cheyenne Tribe* v. *Adsit*, 721 F.2d 1187 (1983), made clear that the

state court adjudication in *W-1* should proceed. *United States* v. *White Mountian Apache Tribe*, 604 F. Supp. 464 (D. Ariz. 1985). The court of appeals affirmed in an opinion rendered on the same date that it rendered the opinion and judgment in the instant case (see *United States* v. *White Mountain Apache Tribe*, 784 F.2d 917 (1986)), but the Tribe has not sought review of that decision.[1]

3. In the instant action, which was filed in the United States District Court for the District of Arizona in 1983, petitioner sought: (i) a declaration that, due to an alleged conflict of interest, the government had mismanaged petitioner's water resources in order to increase the amount of water available for the Salt River Reclamation Project; (ii) a declaration that the alleged conflict of interest disabled the United States from adequately representing petitioner's interests in any water adjudication; (iii) a declaration that the Arizona courts lack jurisdiction in *W-1* to determine reserved water rights held in trust for petitioner; (iv) an injunction barring respondents from taking any further action in *W-1* to represent the United States in its capacity as trustee with respect to those rights; and (v) a declaration quieting title to 14,000 acres that were excluded from the Reservation by an allegedly erroneous survey in 1887 (Pet. App. 5c). The district court dismissed with prejudice all of these claims except the one based on

---

[1] Petitioner, although not a party, also filed a motion in this Court after argument in *San Carlos Apache Tribe*, urging the Court to "dismiss" the state adjudication in *W-1* on the ground that *W-1* is not a general stream adjudication for purposes of the McCarran Amendment. The Court denied the motion, but, treating it as a motion for leave to file a brief amicus curiae, permitted the filing. 463 U.S. at 571-572 n.22.

mismanagement (Pet. App. 1a-10a), and it entered a judgment to that effect under Fed. R. Civ. P. 54(b) (Pet. App. 1b-2b).[2]

The court of appeals affirmed (Pet. App. 1c-10c), observing that this suit "is really another collateral attack on the government's participation in *W-1*" (*id.* at 4c-5c). The court of appeals rejected petitioner's challenge to the superior court's jurisdiction in *W-1*, explaining that Congress has conferred jurisdiction over such suits in the McCarran Amendment; that *San Carlos Apache Tribe* confirmed that jurisdiction specifically with reference to *W-1*; and that the Arizona Supreme Court had rejected other challenges to the superior court's jurisdiction in *United States* v. *Superior Court in and for Maricopa County,*

---

[2] The district court held that petitioner's claim regarding the 14,000 acres excluded by the 1887 survey was barred by a stipulated final judgment entered in 1972 in an action brought by petitioner pursuant to the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 25 U.S.C. (1976 ed.) 70 *et seq.* Pet. App. 2a-7a. Compare *United States* v. *Dann*, 470 U.S. 39 (1985). The court of appeals affirmed that holding (Pet. App. 9c-10c), concluding as well that petitioner's claim is barred by the 12-year statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(f) (Pet. App. 10c n.5). Petitioner does not appear to raise the excluded-land issue in its petition for a writ of certiorari.

We have been informed that on November 3, 1986, the district court dismissed petitioner's mismanagement claim without prejudice, holding that petitioner must first exhaust its administrative remedies within the Department of the Interior. The Tribe also has a claim for money damages, originally filed with the Indian Claims Commission but now pending before the United States Claims Court, based on alleged mismanagement of petitioner's natural resources in the past. See Pet. App. 4a; *White Mountain Apache Tribe* v. *United States*, Cl. Ct. Docket 22H. The trial in that case was recently completed, but no decision has yet been rendered.

144 Ariz. 265, 697 P.2d 658 (1985). See Pet. App. 6c. In addition, relying on *Nevada* v. *United States*, 463 U.S. 110, 128, 140-142 (1983), and *Arizona* v. *California*, 460 U.S. at 627-628, the court of appeals rejected petitioner's contention that the United States has an irreconcilable conflict of interest that disables it from presenting claims for the Fort Apache Reservation in *W-1* (Pet. App. 7c-9c). The court found it difficult to understand in this regard how petitioner's interests could be protected by preventing *any* claim for water for the Reservation from being advanced in *W-1*, because petitioner might entirely lose its water rights as a result. Accordingly, the court concluded that if petitioner believes that the United States has understated the claim for the Reservation, petitioner's remedy is to intervene in *W-1* and seek a more substantial award. *Id.* at 6c-7c, 8c-9c.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. In fact, as the court below observed, petitioner's arguments are so plainly foreclosed that its continuing efforts to prevent the United States from participating in *W-1* have "become an exercise in futility" (Pet. App. 2c). Review by this Court clearly is not warranted.

1. Petitioner's contention (Pet. 8, 10, 15) that the decision of the court of appeals deprives it of the opportunity to prove its claim regarding mismanagement of the Reservation's forest and other natural resources, except in an action for money damages (see note 2, *supra*), is spurious. Petitioner's claim for declaratory and injunctive relief based on mismanagement was *excluded* from the Rule 54(b) par-

tial judgment that was affirmed by the court of appeals and is now before this Court.[3] Moreover, to the extent that petitioner's allegations of mismanagement have a bearing on the amount of water that it believes should be claimed for the Fort Apache Reservation (see Pet. 3-8), petitioner may intervene in *W-1* and seek to prove whatever water rights it wishes to advance in its own behalf. Petitioner also would be free to argue in *W-1* that those rights should not be diminished by any reduction of demand for water that is attributable to improper management practices in the past that affected its resources (Pet. App. 7c). It is in this manner that petitioner would receive the "best assurance that its interest will be protected" (*id.* at 8c), and, as this Court observed, petitioner's right to reject that course is of "dubious" value. *San Carlos Apache Tribe*, 463 U.S. at 566 n.17.

2. Petitioner is equally mistaken in its objections (Pet. 14-19) to the court of appeals' conclusion that this action against the individual federal respondents must be regarded as "one taken against the United States itself" (Pet. App. 5c n.2). This suit was unquestionably brought to frustrate the United States' participation as a party in *W-1* with respect to water rights for the Fort Apache Reservation, to which the United States holds legal title (*id.* at 4c-5c, 6c). Those rights may be adjudicated in the state superior

---

[3] As petitioner elsewhere appears to acknowledge (see Pet. 12-13), the aspect of the case now before the Court concerns only the government's presentation of claims in *W-1*. The district court still has not resolved the merits of petitioner's mismanagement claim, which was recently dismissed without prejudice on the ground that petitioner must first exhaust its administrative remedies. See note 2, *supra*.

court only because Congress, in the McCarran Amendment, waived the sovereign immunity of the United States. See *Colorado River*, 424 U.S. at 809-813; *San Carlos Apache Tribe*, 463 U.S. at 566 n.17; *Nevada* v. *United States*, 463 U.S. at 128, 142. The United States' appearance as a party in *W-1*, and its representation of petitioner's interests to that extent, do not "depend on the [petitioner's] acquiescence." *Heckman* v. *United States*, 224 U.S. 413, 445 (1912). See also Pet. App. 8c; *United States* v. *White Mountain Apache Tribe*, 784 F.2d at 920. Petitioner's attempt in this litigation to prevent respondents from representing (and assisting in representing) the United States in *W-1*—conduct that is manifestly within the scope of their official duties (see, *e.g.*, 28 U.S.C. 516, 519)—renders this in substance a suit against the United States.

For these reasons, if petitioner fears that the United States, through respondents, will not adequately protect its interests, petitioner's recourse must be to advance its *own* claims in *W-1*, independently of the United States (Pet. App. 7c-9c). It is in the McCarran Amendment that Congress has waived the United States' immunity to suit in such matters, and the availability of a McCarran Amendment forum for the presentation of petitioner's objections to the claims advanced by the United States in *W-1* necessarily precludes review in this independent action. Cf. 5 U.S.C. (& Supp. II) 702(2); *Block* v. *North Dakota*, 461 U.S. 273, 282-286 (1983). After all, the manner in which one party typically opposes the claims of another party in a lawsuit is by litigating those claims on the merits in that lawsuit, not by bringing an independent action to prevent the claims from even being presented to the court in the first

place. In any event, the Attorney General's conduct of litigation to which the United States is a party, and the assistance rendered by other federal officials in that endeavor, are matters committed to agency discretion by law. 5 U.S.C. 701(a)(2); see *Swift & Co.* v. *United States*, 276 U.S. 311, 331-332 (1928); *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922); *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888); *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868). See also *Heckler* v. *Chaney*, 470 U.S. 821 (1985).

3. Petitioner also suggests (Pet. 21-23) that the judgment below has somehow abridged its sovereign immunity to suit. Because *this* action was brought by petitioner itself, petitioner's contention apparently is that the adjudication of its water rights in state court in *W-1* would be inconsistent with principles of tribal sovereign immunity. That argument has already been conclusively rejected by this Court. Petitioner may be immune from suit as a *party*, but the water rights held by the United States in trust for petitioner may nonetheless be adjudicated upon joinder of the United States, by virtue of the waiver of the United States' sovereign immunity under the McCarran Amendment. *Colorado River*, 424 U.S. at 809-813; *San Carlos Apache Tribe*, 463 U.S. 566 n.17. Petitioner's allegations of a conflict of interest do not disable the United States from submitting the reserved water rights for the Fort Apache Reservation in that litigation. Pet. App. 8c; see *Nevada* v. *United States*, 463 U.S. at 120. Indeed, petitioner seems to be urging the same position that was adopted by the court of appeals in *Northern Cheyenne Tribe* v. *Adsit*, 668 F.2d 1080, 1089-1090 (9th Cir. 1982), one of the decisions this Court reversed in *San Carlos Apache Tribe*.

4. It is now unmistakably clear that the Superior Court for Maricopa County in Arizona has jurisdiction in *W-1*, and that the United States therefore must present claims for the Fort Apache Reservation in that forum or risk forfeiting *all* water rights for the Reservation. As the court of appeals observed: "It is time that the Tribe accepted th[at] proposition as true." Pet. App. 6c.[4]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

EDWARD J. SHAWAKER
MARTIN W. MATZEN
Attorneys

NOVEMBER 1986

---

[4] Furthermore, the Court of Appeals for the District of Columbia Circuit rejected petitioner's essentially identical and equally baseless attempt to prevent the Attorney General from presenting claims in *W-1*. Under the doctrine of res judicata, that court's disposition independently forecloses petitioner's efforts here.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 181483 40082

FILED
DEC 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-375

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE WHITE MOUNTAIN APACHE TRIBE, a body corporate established pursuant to the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476) and duly recognized by the Secretary of the Interior,

Petitioner,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, DONALD P. HODEL, *et al.*

Respondents.

REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

WILLIAM H. VEEDER
Suite 920
818 18th Street, N.W
Washington, D.C. 20006
(202) 466-3890

Attorney for
White Mountain Apache Tribe
Petitioner

QUESTION PRESENTED IN REPLY

Whether the Court should grant the Writ of Certiorari as prayed for, where, as here, Petitioner White Mountain Apache Tribe has presented for determination critical, unresolved issues respecting federal, state, and tribal jurisdiction as modified by the McCarran Amendment, 43 U.S.C. 666, Respondents having failed in their brief to mention, much less to answer, the issues presented by Petitioner Tribe?

TABLE OF CONTENTS

	Page
FAILURE OF RESPONDENTS TO CONSIDER THE ISSUES PRESENTED BY PETITIONER	1
PETITIONER TRIBE'S REPEATED EFFORTS TO BE HEARD RESPECTING ITS FRAUD CHARGES NOT A McCARRAN AMENDMENT PROCEEDINGS	2
Dissimulation by Respondents Must Not Be Permitted To Mask Issues Actually Presented	2
Introduction by Respondents of Issues in Smith-Watt Case Require Reply	3
San Carlos, Adsit, and Nevada Pending Disposition When Smith-Watt Petition for Certiorari Was Filed	5
Nevada Not Applicable Here	7
Case Against Respondent Hodel and Others	8
Deceptive Tactics of Respondents Must Not Be Permitted To Prevail	10
CONCLUSION	13

TABLE OF AUTHORITIES

	Page
Arizona v. San Carlos Tribe, 463 U.S. 545 (1983).....	6,7,10
Hurley v. Abbott, United States Intevenor (Kent Decree)	4
Nevada v. United States 649 F.2d 1286 (CA 9, 1981); 666 F.2d 351 (CA 9, 1982).....	5
Nevada v. United States 463 U.S. 110 (1983)	7,10
Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (CA 9, 1982)	5
Northern Cheyenne v. Adsit; San Carlos Apache v. Arizona, 721 F.2d 1187 (CA 9, 1983).....	9,10
San Carlos Apache Tribe v. Arizona, et al., 668 F.2d 1093 (CA 9, 1982)	5
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)..	10
White Mountain Apache Tribe v. William French Smith, et al. 675 F.2d 1341 (C.A.D.C. 1982)	5
White Mountain Apache Tribe v. William French Smith, et al., cert. den. 463 U.S. 1228 (1983)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE WHITE MOUNTAIN APACHE TRIBE, a body corporate established pursuant to the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476) and duly recognized by the Secretary of the Interior,

Petitioner,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, DONALD P. HODEL, *et al.*

Respondents.

REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

FAILURE OF RESPONDENTS TO CONSIDER THE ISSUES PRESENTED BY PETITIONER

Failure of Respondents to mention much less to challenge in their brief in opposition the critical jurisdictional questions presented here by Petitioner White Mountain Apache Tribe is a disservice to the Court, Petitioner Tribe, and other Indian Tribes similarly situated. Respondents, by ignoring the prime jurisdictional issue presented by Petitioner Tribe, leave unanswered this question:

Did Congress, when it adopted the McCarran Amendment, 43 U.S.C. 666,[1] a most constrictive waiver of the sovereign immunity of the National Government and Petitioner

[1] Petition for a Writ of Certiorari . . . p. 3, 43 U.S.C. 666, "Suits for adjudication of water rights—Joinder of United States as defendant."

Tribe from suits in state courts, "... for the adjudication of rights to the use of water of a river system or other source ....":

(1) Deprive the District Courts of the United States of jurisdiction to hear and to determine Petitioner Tribe's "private suit" tortious in character charging fraudulent conduct by Respondents, primarily the Secretary of the Interior and subordinates, acting in their individual, not official capacity, in mismanaging Petitioner Tribe's Fort Apache Indian Reservation including Petitioner Tribe's reserved Salt River rights and

(2) Subject Petitioner Tribe to the jurisdiction of the Arizona State Court Water Rights W-1 Proceedings to resolve Petitioner Tribe's charges of fraudulent conduct against the Respondents as individuals for the fraudulent mismanagement of Petitioner Tribe's Reservation, including its reserved Salt River rights?

PETITIONER TRIBE'S REPEATED EFFORTS TO BE HEARD RESPECTING ITS FRAUD CHARGES NOT A McCARRAN AMENDMENT PROCEEDINGS

Dissimulation by Respondents Must Not Be Permitted To Mask Issues Actually Presented

Artfully, Respondents, by their "Question Presented," "Statement," and "Argument," seek to represent Petitioner Tribe's fraud charges against the individual Respondents as routine issues to be heard and determined in the State Court W-1 Proceedings. To that end, Respondents attempt to convert Petitioner Tribe's "private suit" against Respondents as individuals to be a part of a *sui generis* action, public in character, to adjudicate rights to the use of water within the purview of the McCarran Amendment, 43 U.S.C. 666. Moreover, and contrary to facts, Respondents would cast Petitioner Tribe in the role of a recalcitrant trust beneficiary, interfering with the alleged good-faith efforts of Respondents as agents of a prudent trustee to prepare Petitioner Tribe's claim to its reserved Salt River rights and to appear in State court on behalf of Petitioner for the purpose of protecting Petitioner Tribe's reserved Salt River rights.

Alternatively, Respondents urge that, if Petitioner Tribe desires to reject the "good faith" endeavors of Respondents to prepare and to present Petitioner Tribe's claims in the State Court W-1 Proceedings, Petitioner Tribe on its own behalf could prepare a claim, intervene in the State Court W-1 Proceedings, and there have adjudicated the issues of the fraud practiced upon Petitioner Tribe by Respondents in the mismanagement of Petitioner Tribe's Salt River rights. In substance, Respondents dissemble in seeking to present to the Court the proposition that Petitioner Tribe could conduct an adversarial proceedings against Respondents respecting Respondents' fraudulent conduct in the State Court W-1 Proceedings. Respondents fail to contest Petitioner Tribe's documented assertions that the McCarran Amendment was never intended by Congress and could not be a vehicle for subjecting to the State Court W-1 Proceedings the ongoing controversy between Petitioner Tribe and Respondents.

Introduction by Respondents of Issues in Smith-Watt Case Require Reply [2]

Petitioner White Mountain Apache Tribe is forced to reply to Respondents' extended references to the initial action taken by Petitioner Tribe to protect itself against the fraudulent mismanagement of its Salt River reserved rights by Respondents. Markedly the facts in *Smith-Watt* are reviewed and documented in the petition for certiorari filed in this case [3] and need not be restated. As summarized in Tribe's petition, the Salt River and tributaries of that stream arise within Petitioner Tribe's Fort Apache Indian Reservation. Petitioner Tribe's charges that successive Secretaries of the Interior have illegally and fraudulently mismanaged its Salt River reserved rights, its grazing lands, and its forest lands, not primarily for the benefit of Petitioner Tribe, but for the purpose of supplying Salt River water to the Secretarial Federal Reclamation Project.[4]

---

[2] *White Mountain Apache Tribe v. William French Smith, Attorney General and James G. Watt, Secretary of the Interior, et al.*, Civ. No. 81-1205.

[3] Pet. for Cert., p. 3, *et seq.*

[4] *Ibid.*, at p. 5.

What Respondents did not state but should have in regard to *Smith-Watt* is this: Petitioner Tribe asserted to the District Court and to the Court of Appeals for the District of Columbia that the Secretary of the Interior, represented by the Attorney General, fraudulently claims virtually *all* of the Salt River water, to the exclusion of Petitioner Tribe, for the benefit of non-Indian Salt River water users. Geographical location of the Upper Salt River Valley within the Fort Apache Indian Reservation and the service area of the Salt River Federal Reclamation Project are graphically displayed in the Appendix to Tribe's petition for certiorari.[5]

In *Smith-Watt* it was, moreover, contended by Petitioner Tribe that the Attorney General in 1910 had obtained the entry of the *Kent Decree* in the case of *Hurley v. Abbott, United States of America, Intervenor,* in the then Territorial Court which purported to award *all* of the Salt River water to the Secretarial Salt River Project.[6]

The Secretary of the Interior and the Attorney General ignored Petitioner Tribe's protests and advised the Tribe that the fraudulent claim would be filed in the State Court W-1 Proceedings. Thereafter, Petitioner Tribe initiated on May 21, 1981, in the United States District Court for the District of Columbia, its action against the then Attorney General Smith and the then Secretary of the Interior Watt, as individuals.

In denying subject matter jurisdiction, the District Court declared that the Attorney General's "litigating judgment" was not subject to judicial review.[7] On May 16, 1982, the Court of Appeals for the District of Columbia upheld the dismissal respecting the Attorney General's "litigating judgment" declaring, nevertheless, in regard to the Secretary of the Interior, a co-defendant, that its decision:

> . . . intimates no views about federal jurisdiction under 28 U.S.C. Sec. 1362 (1976) or otherwise, over a

---

[5] App. E, Pet. for Cert., Location Map, p. 4e, Fort Apache Indian reservation; p. 3e, Service Area, Salt River Federal Reclamation Project, *Kent Decree* Area.

[6] *Ibid.*, at p. 3e.

[7] See Appendix A of this Reply, Order dated June 22, 1981, *White Mountain Apache Tribe v. William French Smith, et al.*

> suit by this or any other tribe, challenging other actions by the Secretary of the Interior with respect to the exercise of his trust responsibilities. Nor do we express any views about the merits of the litigation now pending in the state and federal courts in Arizona.[8]

On June 22, 1982, Petitioner Tribe filed its petition for a writ of certiorari in the *Smith-Watt* case. Pending before the Court at the time of the filing of the last mentioned petition were cases concerning which the McCarran Amendment, 43 U.S.C. 666, was directly or inferentially involved. Nevertheless, as stressed throughout this reply, the McCarran Amendment is constricted to "general adjudication" proceedings and not to "private suits" of the character of the *Smith-Watt* case, or the case giving rise to this petition.

San Carlos, Adsit, and Nevada Pending Disposition when Smith-Watt Petition for Certiorari Was Filed

When the *Smith-Watt* petition was filed there were awaiting decisions in this Court the following cases: *San Carlos Apache Tribe v. Arizona,*[9] *Northern Cheyenne Tribe v. Adsit,*[10] and *Nevada v. United States.*[11] Cognizant that decisions in those cases could impact the disposition of the petition in *Smith-Watt,* Petitioner Tribe, though not a party to either *San Carlos* or *Adsit,* was granted leave to file its motion on June 3, 1983,[12] during the pendency of Tribe's petition for certiorari in the *Smith-Watt* case. There Petitioner Tribe stressed to the Court that the critical "threshold issues" of jurisdiction and adequacy had not been raised in either *San Carlos* or *Adsit* but should be raised and determined antecedent to the disposition of those cases.

---

[8] Appendix B, unpublished, Judgment and Memorandum Opinion; only affirmance noted in 675 F.2d 1341 (C.A.D.C. 1982).

[9] 668 F.2d 1093 (CA 9, 1982).

[10] 668 F.2d 1080 (CA 9, 1982).

[11] 649 F.2d, 1286 (CA 9, 1981), 666 F.2d 351 (CA 9, 1982).

[12] June 3, 1983, Nos. 81-2147, 81-2188, Motion of White Mountain Apache Tribe to Dismiss for Lack of Subject Matter Jurisdiction in this Court, p. 4.

The Court directed the Solicitor General to respond to Petitioner Tribe's motion raising the threshold questions. That official, after acknowledging the pendency of Tribe's petition for certiorari in *Smith-Watt,* said this:

> . . . we agree with Movants [Petitioner Tribe] that this Court ought not approve the dismissal of the federal court action unless it first concludes that the Indian water rights can be adjudicated in the pending State court proceedings in Arizona and Montana.[13]

Continuing, moreover, the Solicitor General acknowledged that:

> . . . although the sufficiency of the State court proceedings has been challenged by some of the parties . . . it is right to say that the question has not been fully briefed in this Court and that the opinions below offer little assistance on the issue. Of course, '[i]f there is any substantial doubt' as to whether 'the parallel State-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties,' 'it would be a serious abuse of discretion' for the federal court to dismiss the case filed there.[14]

Thereafter on July 1, 1983, the Court rendered its *Arizona v. San Carlos; Montana v. Northern Cheyenne Tribe-Adsit* decision stating that:

> In the cases before us, assuming that the state adjudications are adequate to quantify the rights at issue in the federal suits, . . . we must conclude that the District Courts were correct in deferring to the state proceedings.[15]

---

[13] June 14, 1983, Response of the United States to Motion for Leave to File and Motion To Dismiss for Lack of Jurisdiction, p. 2.

[14] *Ibid.,* at pp. 4-5.

[15] *Arizona v. San Carlos Apache Tribe,* 463 U.S. 545, 570 (1983).

And adding, by way of footnote, this further qualification to that statement:

> In a number of these cases, respondents have raised challenges, not yet addressed either by the Court of Appeals or in this opinion, to the jurisdiction or adequacy of the particular state proceeding at issue to adjudicate some or all of the rights asserted in the federal suit. These challenges remain open for consideration on remand.[16]

Shortly thereafter, on July 6, 1983, more than a year after the Tribe filed its petition for a writ of certiorari in *Smith-Watt,* the Court entered its order denying that petition.[17]

It is relevant, in light of this Petition, that immediately prior to the July 1, 1983 *San Carlos* opinion, the Court rendered its opinion in *Nevada,* declaring, among other things, that the Secretary of the Interior would not be required to adhere to the strict standards of a private Trustee.[18]

Nevada Not Applicable Here

Reliance upon *Nevada* by Respondents is misplaced.[19] In *Nevada* the issue of fraud in the preparation of that Tribe's reserved rights there involved had not been raised antecedent to the initiation of the case giving rise to that decision. Indeed, the Department of Justice itself sought to modify the decree that had been entered. Not so here. Petitioner Tribe acted promptly, insisting that it is grossly improper for the Attorney General to force his representation on Petitioner Tribe in the State Court W-1 Proceedings, having previously appeared on behalf of the Secretary of the Interior and having joined in the entry of the Kent Decree, which explicitly allocates all of the Salt River waters to the non-Indian Salt River water users to the exclusion of the claims of Petitioner Tribe, underscoring the fraud practiced upon Petitioner Tribe. It would be manifestly

---

[16] *Ibid.,* p. 570, ftn. 20.

[17] No. 81-2334, *White Mountain Apache Tribe v. Smith, Attorney General, et al., cert. den.* 463 U.S. 1228 (1983).

[18] *Nevada v. United States,* 463 U.S. 110, 128 (1983).

[19] Brief for Respondents, pp. 7, 9, 10.

unjust and totally improper to force the Tribe into the State Court W-1 Proceedings, which fully recognizes the Kent Decree, thus consummating the fraud practiced on Petition Tribe antecedent to resolution of the conflict between Petitioner Tribe and the Secretary of the Interior in the *Hodel* case, to which this petition pertains.

Case Against Respondent Hodel and Others

On October 20, 1983, Petitioner Tribe filed its complaint in the United States District Court for the District of Arizona in the case of *White Mountain Apache Tribe v. James G. Watt, Secretary* [now Donald P. Hodel], *et al.*, Civ. No. 83-2045 PCT CAM, referred to here as the *Hodel* case.[20]

The *Hodel* case was patterned after the Memorandum Opinion of the Court of Appeals for the District of Columbia in the *Smith-Watt* case,[21] alleging, among other things, that the Secretary of the Interior, in clear violation of the official's trust obligation owing to Petitioner Tribe, had intentionally violated Petitioner Tribe's Salt River reserved rights for the benefit of the Salt River Federal Reclamation Project and that the State Court W-1 Proceedings was totally inadequate. In *Hodel,* moreover, Petitioner Tribe documents its contention that the State Court W-1 Proceeding is wholly without jurisdiction to hear and adjudicate the controversy between Petitioner Tribe and the Secretary of the Interior, who, together with other Respondents, is violating Petitioner Tribe's Salt River rights through his fraudulent conduct.[22]

Subsequent to the filing of Petitioner Tribe's complaint in the *Hodel* case, the Court of Appeals for the Ninth Circuit, on December 9, 1983, rendered its opinion on remand from this Court's *San Carlos Apache* decision. The Ninth Circuit declared that the issues of jurisdiction and adequacy of the State court proceedings must be resolved in the State courts, explicitly emphasizing, moreover—it is believed in plain and serious

---

[20] Pet. for Cert., p. 3, *et seq.*

[21] *See,* Appendix B to this Reply.

[22] Pet. for Cert., p. 10, *et seq.*

error—that neither the issue of jurisdiction nor adequacy of the State Court W-1 Proceedings will be considered:

> . . . *prior to conclusion of the state court proceedings,* and we instruct the district courts to do the same.[23]

Applying what is perceived to be the rationale of this Court's *San Carlos* opinion—as interpreted by the Court of Appeals of the Ninth Circuit—the District Court dismissed Petitioner Tribe's *Hodel* complaint, declaring in effect, that Petitioner Tribe would not be heard respecting its fraud claims for at least a half century due to the magnitude and protracted character of the State Court W-1 Proceedings, and justifying that dismissal as being:

> Pursuant to the mandate set forth in *Northern Cheyenne, supra,* as well as the decision in *Arizona v. San Carlos Apache Tribe of Arizona, supra,* this Court will dismiss Plaintiff's Complaint *as to its allegations of lack of jurisdiction in the state court to make determinations concerning federal water rights.*[24]

Petitioner Tribe moved for reconsideration of the order of dismissal and the District Court modified that order, granting its "Rule 54(b) Judgment" in which it declared:

> All claims raised in the complaint except plaintiff's mismanagement claim are dismissed with prejudice.[25]

The District Court further declared that the mismanagement claim is dismissed without prejudice, granting Petitioner Tribe leave to file an Amended Complaint within a specified time. Pursuant to the District Court's order, Petitioner Tribe was forced to sever from its complaint in *Hodel* its Salt River reserved rights concerning which it had specifically claimed fraudulent mismanagement by successive Secretaries of the Interior and the other Respondents. Recently the District Court

---

[23] *Northern Cheyenne Tribe v. Adsit; San Carlos, Apache v. Arizona,* 721 F.2d 1187, 1188 (CA 9, 1983). (Emphasis supplied).

[24] App. A, Pet. for Cert. pp. 10a-11a. (Emphasis supplied)

[25] App. B, Pet. for Cert., pp. 1b-2b.

required Petitioner Tribe to exhaust its administrative remedies prior to invoking the District Court's jurisdiction. That ruling is irrelevant to this petition.

Deceptive Tactics of Respondents Must Not Be Permitted To Prevail

By avoiding reference in their brief to the issues presented in Tribe's petition for certiorari and by representing that the State Court W-1 Proceedings is adequate to resolve all issues involved, Respondents seek by protracted delay to avoid responsibility for their wrongdoing. Respondents are fully aware that in the extended period between the present and when the final judgment in the State Court W-1 Proceedings is entered involves at least a half century.[26] In that period of time, Respondents are assured that Petitioner Tribe's claims will be abandoned. They seek, moreover, by presenting discursive issues in their brief, to blur the pressing need to have the fraud issue resolved at this time. An example of a meaningless issue is this ploy set forth by Respondents in their brief:

> Petitioner also suggests (Pet. 21-23) that the judgment below has somehow abridged its sovereign immunity to suit. Because this action was brought by petitioner itself, petitioner's contention apparently is that the adjudication of its water rights in state court in W-1 would be inconsistent with its principles of sovereign immunity.[27]

Respondents are fully aware that Petitioner Tribe has invoked its sovereign immunity from suit as a complete barrier to Respondents' efforts to have the fraud issue tried in a state court which lacks jurisdiction to try those issues against Respondents.[28] Respondents, moreover, know, or most assuredly should know, that neither *Nevada, San Carlos,* nor the Ninth Circuit's interpretation of those decisions pertains to actions of the character initiated by Petitioner Tribe to expose and to

---

[26] *See,* Pet. for Cert., p. 13, W-1 In Its Infancy.

[27] Respondents' Brief, p. 10.

[28] Pet., p. 22, citing *Santa Clara Pueblo;* Tribe's immunity from suit not to be waived by implication.

restrain Respondents in their course of fraudulent conduct. It is crude sophistry for Respondents to assert—absent a resolution of the fraud charges—that:

> . . . it is now unmistakably clear that the Superior Court . . . in Arizona has jurisdiction in W-1

and that Respondents must present claims for Petitioner Tribe

> . . . or risk forfeiting all rights for the Reservation.[29]

That spurious contention continues the attempt to evade the critical issue of whether Petitioner Tribe can legally be forced to have its rights and interests subverted to the W-1 Proceedings by Respondents when Petitioner Tribe is prepared to prove in *Hodel* that Respondents are and have been practicing fraud upon Petitioner Tribe. Tribe asserts in *Hodel* that those charges should be heard in a federal forum that has jurisdiction and not the State Court W-1 Proceedings that could not hear and adjudicate Petitioner Tribe's charges.

Understandably, Respondents embrace totally the misconceptions of the court below [30] which in plain and serious error declares:

> We likewise reject the Tribe's contention that, because the water rights claim filed by the government on the Tribe's behalf is 'fraudulent,' the employees covered by the Tribal Court injunctions were not acting within the scope of their duties as federal officers.[31]

Respondents consistently fail to mention the explicit language of Petitioner Tribe's *Hodel* complain in which fraud is explicitly charged, which is not within the purview of the McCarran Amendment, and consistently adopt and repeat the

---

[29] Respondents' Brief, p. 11.

[30] *Ibid.*

[31] Pet., p. 22, quoting from Petitioner's companion case not here for review.

mistaken concepts of the court below, which in error declares, irrespective of the fraud charges, that:

> The state court *does* have the authority to adjudicate tribal water rights in W-1 . . . .[32]

Likewise adopted in error by Respondents in support of their concepts is their paraphrasing of the misconception by the court below of Petitioner Tribe's *Hodel* case, which is in part as follows:

> [Petitioner Tribe sought in the *Hodel* case] (iii) a declaration that the Arizona courts lack jurisdiction in W-1 to determine reserved water rights held in trust for petitioner; . . . .[33]

> and state further that Petitioner Tribe seeks to enjoin ". . . the United States in its capacity as trustee with respect to those rights."[34]

> Petitioner Tribe has *never* asserted here or elsewhere that the United States as trustee, acting through authorized agents, could not properly represent Petitioner Tribe in a proper proceeding in a court having adequate jurisdiction. Both the court below and Respondents, while seeking to ignore Petitioner Tribe's charges of Secretarial fraud, have failed to refer to any authority—there is none—that denies Petitioner Tribe the right to be heard in a federal court respecting those charges and in contemplation of its own sovereignty.

---

[32] App. C. to Pet. for Cert., p. 6c.

[33] Respondents' Brief, p. 5; App. C, Pet. for Cert., p. 5c.

[34] *Ibid.*

CONCLUSION

Petitioner Tribe respectfully prays the Court to grant a writ of certiorari allowing Petitioner Tribe fully to be heard respecting the facts of this case which on review are admitted. Petitioner Tribe's charges of fraud should be resolved as a condition to any attempt to subvert Petitioner Tribe or its invaluable Salt River reserved rights to the State Court W-1 Proceedings.

The ancient maximum that justice delayed is justice denied is most appropos under the circumstances here.

Respectfully submitted,

WILLIAM H. VEEDER
818 18th Street N.W. #920
Washington, D.C. 20006
[202] 466-3890

Attorney for Petitioner
White Mountain Apache Tribe

Dated December , 1986.

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 81-1205

THE WHITE MOUNTAIN APACHE TRIBE,
Plaintiffs,

v.

WILLIAM FRENCH SMITH, *et al.*,
Defendants.

[Filed Jun. 23, 1981]

ORDER

Having considered the motion of the United States to dismiss this action to enjoin the appearance of the Attorney General in proceedings pending in Maricopa County Superior Court, Arizona, and the memoranda and auxiliary documents filed by the parties in support of and in opposition to the motion, the Court concludes that neither 5 U.S.C. § 701, *et seq.*, 28 U.S.C. 1362, nor 28 U.S.C. §§ 2201-2202, nor any other statute gives this Court jurisdiction over the Attorney General's exercise of litigating judgment. In addition, plaintiff has an adequate remedy at law in the state court proceeding subject, as it is, to potential appellate review in the United States Supreme Court. Accoridngly, it is hereby

ORDERED: That the complaint filed herein by the White Mountain Apache Tribe is dismissed.

/s/ Louis F. Oberdorfer
United States District Judge

Date: June 22, 1981

APPENDIX B

Not to be Published—See Local Rule 8(f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Civil Action No. 81-01205

No. 81-1944

WHITE MOUNTAIN APACHE TRIBE,
Appellant

v.

WILLIAM FRENCH SMITH, *et al.*,

[Filed Mar. 16, 1982]

Appeal from the United States District Court
for the District of Columbia

Before: WALD, MIKVA and EDWARDS,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration of the foregoing, it is.

ORDERED AND ADJUDGED, by this Court, that the judgment of the District Court appealed from herein is affirmed for the reasons set forth in the attached memorandum.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

MEMORANDUM

The White Mountain Apache Tribe brought suit in the United States District Court for the District of Columbia, to enjoin the Attorney General and the Secretary of the Interior from participating in litigation in Arizona state court, No. W-1, that seeks an adjudication of water rights in the Salt River basin.[1] As bases for jurisdiction, the Tribe alleged the Administrative Procedure Act, 5 U.S.C. § 702 (1976); the Declaratory Judgments Act, 28 U.S.C. §§ 2201-02 (1976 & Supp. III 1979); and the statute extending general federal question jurisdiction to Indian tribes, 28 U.S.C. § 1362 (1976). The District Court dismissed the suit for lack of subject matter jurisdiction, reasoning that neither these nor any other statute conferred subject matter jurisdiction over an effort to enjoin the Attorney General's exercise of litigating judgment. We agree with the District Court insofar as it held that it lacked subject matter jurisdiction over this attempt by the Attorney General to exercise his litigating discretion.

---

[1] The present posture of the Arizona litigation is complex. In *In Re the General Adjudication of the Rights to Use Water in the Salt River Watershed Above Granite Reef Dam, Excluding the Verde River Tributary,* No. W-1, what is sought is a puported general adjudication of the rights to use water in a portion of the Salt River watershed. The United States, while preserving its rights to appear in No. W-1 to assert claims for water rights held in trust for Indian tribes, has moved to dismiss No. W-1 for lack of jurisdiction under the McCarran Amendment waiver of sovereign immunity in general water rights adjudications, 43 U.S.C. § 666 (1976). Additionally, the federal District Court for the District of Arizona dismissed an effort by a number of Indian tribes with interest in the Salt River to remove the litigation to federal court, in favor of the state court proceeding. *In re Determination of Conflicting Rights to the Use of Water from the Salt River Above Granite Reef Dam,* 484 F. Supp. 778 (D. Ariz. 1980). The Ninth Circuit has recently reversed and remanded to the District Court for a determination of whether Arizona has repealed a disclaimer of jurisdiction over Indian lands, which disclaimer would bar the Arizona courts from asserting jurisdiction over the Indian water rights at issue in No. W-1. *San Carlos Apache Tribe v. Arizona,* No. 80-5137 (9th Cir. Feb. 23, 1982). *See Northern Cheyenne Tribe v. Adsit,* No. 79-4887 (9th Cir. Feb. 22, 1982) (McCarran Amendment does not implicitly repeal state disclaimers to the exercise of jurisdiction over Indian lands).

We note that the complaint alleges generally, and the Tribe argues vigorously, that the Secretary of the Interior has violated his trust responsibilities towards them. The specific violation complained of here, however, is the Attorney General's decision on behalf of the Secretary to participate in the Arizona litigation. So the trial judge read the complaint, and it is on this basis that we affirm. Our decision intimates no views about federal jurisdiction under 28 U.S.C. § 1362 (1976) or otherwise, over a suit by this or any other tribe, challenging other actions by the Secretary of the Interior with respect to the exercise of his trust responsibilities. Nor do we express any views about the merits of the litigation now pending in the state and federal courts in Arizona.